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No. 05-___ 05-316

IN THE
Supreme Court of the United States

DAVID DORAN,
Petitioner,

v.

DENNIS ECKOLD, in his official capacity as President of the Board of Police Commissioners of Kansas City, Missouri, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises two Fourth Amendment issues:

1. Whether, in states that allow magistrates to issue "no-knock" search warrants, police officers who have not obtained a no-knock warrant may independently decide, based entirely on circumstances known when a warrant application was presented to a magistrate, to execute a regular warrant without knocking and announcing their presence.

2. Whether police officers' suspicions that a house contains illegal drug activity and individuals who own weapons create "exigent circumstances" permitting the officers to execute a search warrant without knocking and announcing their presence.

PARTIES TO THE PROCEEDINGS

Petitioner David Doran is the only plaintiff in this case.

The defendants in the district court were: Dennis Eckold, in his official capacity as President of the Board of Police Commissioners of Kansas City; Joseph J. Mulvihill, in his official capacity as Vice President of the Board of Police Commissioners of Kansas City; Dr. Stacey Daniels-Young, in her official capacity as a member of the Board of Police Commissioners of Kansas City; Karl Zobrist, in his official capacity as a member of the Board of Police Commissioners of Kansas City; Mayor Kay Barnes, in her official capacity as a member of the Board of Police Commissioners of Kansas City; Officer Mark Sumpter, in his official capacity as a police officer of the Kansas City Police Department, and in his individual capacity; Officer Ty Grant, in his official capacity as a police officer of the Kansas City Police Department, and in his individual capacity; Sergeant Eric Greenwell, in his official capacity as a police officer of the Kansas City Police Department, and in his individual capacity; and Detective Wesley Williamson, in his official capacity as a police officer of the Kansas City Police Department, and in his individual capacity.

The district court entered summary judgment in favor of Williamson and the post-trial judgment in favor of Sumpter, and Petitioner did not appeal those determinations. The other defendants are the Respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Doran respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in *Doran v. Eckold*, No. 03-1810-WM.

OPINIONS BELOW

The en banc opinion of the Eighth Circuit is reported at 409 F.3d 958 (8th Cir. 2005), and is reproduced at App. 1a-29a. The original panel opinion of the Eighth Circuit is reported at 362 F.3d 1047 (8th Cir. 2004), and is reproduced in the App. at 30a-48a. The district court's relevant order is unpublished and is reproduced at App. 49a-66a.

JURISDICTION

The Eighth Circuit issued its en banc opinion on June 6, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment of the United States Constitution provides: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case presents two pressing issues concerning the Fourth Amendment's knock-and-announce doctrine that have divided federal courts of appeal and state courts of last resort.

1. On July 20, 1998, the Kansas City, Missouri, Police Department received an anonymous tip. Apart from listing

basic information such as Petitioner's name and address, the tip, as recorded in the Department's "DRAGNET" system, stated in full:

> Suspect #1 [Petitioner] and #2 [his wife] are making crystal meth at the residence and selling it. They keep the drugs in various dresser drawers throughout the house. The guns are kept in the master bedrooms [sic] closet and underneath the bed. The best way to get to know the #1 and #2 suspects is to make friends with the #3 suspect, who is the son. The #3 suspect had recently been arrested for having a sawed off shotgun in his possession.

App. 68a (record of tip); *see also* App. 3a (summarizing tip).

Shortly after the police received the tip, a narcotics detective verified the house's location, in a middle-class suburbanized neighborhood, and determined that cars parked in front were registered to Petitioner and his wife. App. 3a; App. 68a. The detective also collected bags of trash from Petitioner's residence. In the trash, the officer found methamphetamine residue in two plastic bags, as well as a few other items they believed suggested possible drug distribution: fifty sandwich bags with the corners cut out, three sandwich bag corners, and one empty box of a "Dristan" product that contains pseudoephedrine.

The police, however, never attempted any "controlled buy" or surveillance to determine whether Petitioner was actually selling drugs from his house. Nor did the police ever run any criminal history or other background check for Petitioner or his son. If they had, they would have learned that Petitioner was a Vietnam veteran with no criminal record, and that his son had never, in fact, been arrested or otherwise suspected of possessing any firearms. App. 14a, 53a. Nor did the police ever attempt to determine whether the son, who they

knew from the tip was 26 years old (*see* App. 68a), lived in Petitioner's house. App. 17a (Heaney, J., dissenting).

On August 6, 1998, the detective described the anonymous tip and his trash inspection in a warrant application to a Missouri magistrate and obtained a warrant to search Petitioner's house for drugs and firearms. Although Missouri permits its magistrates to issue "no knock" warrants, *e.g.*, *United States v. Mack*, 117 F. Supp. 2d 935, 939 (W.D. Mo. 2000), the detective did not seek or obtain such a warrant.

During the night of August 11, 1998 – five days after obtaining the warrant and more than three weeks after receiving the anonymous tip – the police decided to search Petitioner's house. The narcotics detective showed the warrant and described his prior investigation to Sergeant Greenwell, the head of the Police Department's Street Narcotics Unit. The Street Narcotics Unit is a specialized unit whose primary function is to execute search warrants for illegal drug activity, usually on suspected "drug houses." App. 4a.

At the time of the search, the Street Narcotics Unit's custom and practice was never to knock and announce their presence before executing search warrants – regardless of whether the warrant to be executed was a no-knock warrant. App. 31a-32a, 35a, 64a. Instead, they *always* conducted "dynamic entries," meaning that several officers would level the house's door with a battering ram and rush inside with weapons drawn. The officers would yell "police, search warrant" as they beat down the door. App. 1a-2a.

The officers followed that practice here. When they arrived late at night, the house was quiet and displayed no evidence of illegal activity. Petitioner was asleep when he heard the ramming. Thinking the noise was a break-in or a fight on the front porch, he grabbed a pistol, "ran into the kitchen, saw laser lights and realized it was the police, and bent

down to set his gun on the floor." App. 2a. While Petitioner was doing this, one officer shot him twice, critically injuring him (although, after undergoing emergency surgery, he survived). Petitioner's wife remained safe in the bedroom, and Petitioner's son was not in the house.

The tip turned out to be false. The police's search of Petitioner's house uncovered one ounce of marijuana but neither a methamphetamine lab nor any other illegal drugs or weapons. The authorities did not charge Petitioner with any offense.

2. Petitioner brought suit in the United States District Court for the Western District of Missouri against the Board of Police Commissioners of Kansas City (by means of suing its President, Dennis Eckold and its other members in their official capacities, *see* App. 60a), and certain individual officers who were involved in the investigation and dynamic entry. Petitioner claimed, *inter alia*, that: (1) the Police Department's custom and practice of executing all search warrants for drug houses by means of no-knock entries violated the Fourth Amendment; (2) the Department failed to train its officers to comply with the Fourth Amendment; (3) the individual officers here did not have sufficient justification to conduct a no-knock entry; and (4) the officer who shot Petitioner used excessive force. Petitioner sought damages under 42 U.S.C. § 1983.

Following trial, but before the jury began deliberating, the district court ruled as a matter of law that no "exigent circumstances" existed to justify the no-knock entry into Petitioner's home. The court explained later in reaffirming this ruling that its determination rested on two grounds. First, all of the facts the officers claimed justified their no-knock entry were "known to [them] at the time they applied for a search warrant, but they never requested a judicial officer to issue a no-knock warrant." App. 55a-56a. Second, the court noted that the officers had not obtained, or even seriously tried to

obtain, particularized information suggesting that announcing their presence would be unduly dangerous. App. 55a.

The jury rejected Petitioner's excessive force claim, presumably reasoning that once the officers were inside Petitioner's house, the officer's use of deadly force was reasonable. But the jury concluded that the police had acted unreasonably in setting in motion the officer's use of this force – that is, by breaking into Petitioner's house without knocking and announcing in the first place. Specifically, the jury found that the Police Department's no-knock policy was unconstitutional and that the Department failed properly to train its officers. The jury also found that two of the officers who directed and executed the no-knock entry lacked sufficient justification on the facts of this case for doing so. The jury found that these constitutional violations proximately caused Petitioner's injuries and damage to his home, App. 33a-35a, and awarded him $2,015,000 in compensatory damages.

3. The police appealed to the Eighth Circuit. Recognizing that the entire verdict was enforceable against the Board, and thus that Petitioner's claims against the individual officers had become irrelevant to the amount of damages at issue, the police did not challenge the judgment against the individual officers on qualified immunity grounds. Nor did the police dispute the existence or defend the constitutionality of the Police Department's custom and practice of never knocking and announcing before executing search warrants on suspected drug houses. Instead, relying on the doctrine that a plaintiff may not recover damages in a § 1983 case – even one based on an unconstitutional municipal policy – unless his particular constitutional rights were violated, *see, e.g., City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985); *Roach v. City of Fredericktown*, 882 F.2d 294, 298 (8th Cir. 1989), the police narrowed their defense to Petitioner's Fourth Amendment claims to a single argument: that they were aware of facts in this particular case before executing the warrant that justified

their no-knock entry. A divided panel of the Eighth Circuit rejected this argument, holding that the facts known to the officers executing the warrant did not amount to exigent circumstances, and affirmed the judgment. App. 35a-39a, 41a.

4. The Eighth Circuit vacated the panel opinion and took the case en banc. After reargument, an eight-to-four majority reversed the judgment.[1] The majority rejected both grounds the district court had cited in concluding that no exigent circumstances justified the no-knock entry. First, disregarding the Eighth Circuit's statement less than one year prior that "when officers know, before searching, of circumstances that they believe justify a no-knock entry, it seems more consistent with the Fourth Amendment to ask a neutral judge for approval before invading a person's privacy," *United States v. Scroggins*, 361 F.3d 1075, 1082 (8th Cir. 2004), the en banc majority held that "the district court erred in emphasizing that the facts known to the police as they approached the Doran house were the same facts known when they applied for the warrant." App. 10a. Second, the majority held that the facts known to the officers who executed the warrant – that the house was suspected of harboring a methamphetamine lab, a stash of drugs for street sales, multiple weapons, and that the tipster alleged that the homeowner's son recently had been arrested for possessing an illegal firearm – constituted a reasonable suspicion of exigent circumstances justifying the no-knock entry. App. 15a.

The dissent disagreed on both points. The dissent first found "no authority for the proposition that an officer, armed with all the knowledge that he believes supports a no-knock entry prior to asking for a warrant, may nonetheless usurp the role of the magistrate and decide on his own whether to knock and announce his presence." App. 27a-28a; *see also id.* at 22a-

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[1] Judge Richard Arnold, who had written the original panel opinion, died before reargument and thus did not cast a vote in the en banc proceeding.

23a nn. 10 &11. The dissent also stressed the officers' failure to develop particularized information showing that announcing their presence "*in this case*" would be dangerous. App. 17a-18a, 25a. In the dissent's view, the majority's ruling allowing generalized suspicions regarding drugs and weapons to suffice to dispense with knocking-and-announcing "create[s] a blanket exception" that "stands at odds with the Supreme Court's knock-and-announce jurisprudence." App. 25a, 28a-29a (internal quotation and citation omitted).

REASONS FOR GRANTING THE WRIT

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), this Court held that the centuries-old, "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." *Id.* at 929. At the same time, this Court made it clear that the knock-and-announce requirement is not absolute. When police officers reasonably suspect that knocking and announcing their presence "would be dangerous or futile, or that it would inhibit the effective investigation of the crime," they may lawfully enter a dwelling without doing so. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997); *accord Wilson*, 514 U.S. at 934-36.

In the decade since *Wilson* confirmed the constitutional status of the knock-and-announce doctrine, the federal courts of appeals and state courts of last resort have divided over when exactly officers may execute no-knock entries. Two deep conflicts in particular infect the current legal landscape. First, courts are divided over whether, in states that allow magistrates to grant police officers' advance permission to conduct no-knock entries, police officers may independently decide that facts known at the time of the warrant application justify executing the warrant without knocking and announcing their presence. Second, courts are divided, as a purely substantive matter, over what types of suspicions regarding illegal drug activity and weapons create "exigent

circumstances" permitting police officers to execute a warrant without knocking and announcing.

This Court should use this case, which presents both of these issues, to clarify this critical area of Fourth Amendment jurisprudence. Police frequently conduct no-knock entries, and, as this case well illustrates, such entries can trigger tragic altercations. Yet the Eighth Circuit's ruling fails to impose any serious check against police officers' invading people's homes based solely on their own generalized, unwarranted suspicions. This position is in serious tension, if not outright conflict, with the longstanding "reverence of the law for the individual's right of privacy in his house." *Miller v. United States*, 357 U.S. 301, 313 (1958); *see also Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("the right of a man to retreat into his home and there be free from unreasonable government intrusion stands at the very core of the Fourth Amendment") (quotation omitted).

I. This Court Should Resolve The Confusion Over Whether Police Officers, In States That Allow The Issuance Of No-Knock Search Warrants, May Independently Decide Based Entirely On Foreknown Facts To Dispense With Knocking And Announcing Their Presence.

Over the past thirty-five years, at least thirty-four states have come to allow magistrates to issue "no-knock warrants" when the police demonstrate ahead of time that knocking and announcing their presence in executing a search warrant would be sufficiently dangerous.[2] In *Richards v. Wisconsin*, 520 U.S.

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[2] *See Richards*, 520 U.S. at 396 n.7 (noting that some states, including Illinois, Nebraska, Oklahoma, South Dakota, and Utah, allow no-knock warrants); *see also United States v. Young*, 229 F. Supp. 2d 1325, 1326 (M.D. Ala. 2002); *United States v. Potts*, 1993 WL 360742, at *1 (9th Cir. 1993) (Alaska); *Holt v. State*, 151 S.W.3d 1, 2 (Ark. App. 2004); Colo. Rev. Stat. 16-3-303(4); *State v. Cochran*, ___ S.E.2d ___, 2005 WL 1994428 (Ga. App. Aug. 19, 2005); *State v. Pierce*, 47 P.3d 1266, 1267 (Idaho

385 (1997), this Court stated that granting such advance approval for no-knock entries is permissible under the Fourth Amendment. *Id.* at 396 n.7; *accord United States v. Banks*, 540 U.S. 31, 36-37 (2003). This Court also held that when new circumstances arise during police officers' executions of regular warrants, officers in such states may still exercise "independent judgment" to conduct no-knock entries,. *Id.* Accordingly, *Richards* upheld a no-knock entry without a no-knock warrant because when the police arrived to execute the warrant, the dwelling's occupants learned of the officers' presence, slammed and locked the door, and began to flee. *Richards*, 520 U.S. at 388-89, 395-96.

In the years since the *Richards* decision, federal and state courts have divided over the question that *Richards* left unresolved: whether officers in a state that allows no-knock warrants may execute a no-knock entry without such a warrant *when nothing new happens or is learned between obtaining a*

2002); *United States v. Dumes*, 313 F.3d 372, 379 (7th Cir. 2002) (Indiana); *United States v. Baker*, 16 F.3d 854, 855, 858 (8th Cir. 1994) (Iowa); *State v. Creason*, 38 P.3d 985, 987 (Kan. App. 2004); *United States v. Johnson*, 267 F.3d 498 (6th Cir. 2001) (Kentucky); *State v. Clay*, 408 So.2d 1295, 1297 (La. 1982); *United States v. Keene*, 341 F.3d 78 (1st Cir. 2003) (Maine); *Manni*, 500 N.E.2d at 742-43 (Massachusetts); *Garza*, 632 N.W.2d at 638 (Minnesota); *White v. State*, 746 So.2d 953, 956 (Miss. App. 1999); *United States v. Mack*, 117 F. Supp. 2d 935, 939 (W.D. Mo. 2000) & Trial Transcript at 585-86 (Oct. 23, 2002) (Missouri); *Anyan*, 104 P.3d at 520, 525 (Montana); *State v. Johnson*, 774 A.2d 1273, 1278 (N.J. 2001); *State v. Ortega*, 836 P.2d 639, 641 (N.M. 1992); N.Y. Crim. Proc. Law § 690.35(4)(b); *United States v. Powell*, 1994 WL 369491, at *4 (4th Cir. 1994) (North Carolina); N.D. Cent. Code. § 29-29-08; Ohio Rev. Code Ann. §§ 2933.231(B) & (C); *Commonwealth v. Grubb*, 595 A.2d 133 (Pa. Super. 1991); *State v. Perry*, 2005 WL 675255, at *5 (Tenn. Crim. App. 2005); *Patterson v. State*, 138 S.W.3d 643, 646 (Tex. App. 2004); *Fenner*, 748 F. Supp. at 412-413 (Virginia); *Henderson*, 629 N.W.2d at 622 (Wisconsin); Wyo. Stat. 35-7-1045(e). Some states, as well as the federal government, formally prohibit issuing no-knock warrants, *see Richards*, 520 U.S. at 396 n.7; other states do not have published law on the subject.

regular warrant and executing it. Put another way, there is a deep conflict over whether the Fourth Amendment permits officers to use their "independent judgment," *id.* at 396 n.7, not merely to assess whether new circumstances that arise while executing a warrant justify a no-knock entry, but instead to make a determination balancing dangerousness against individual privacy that a magistrate was ready and able to make when the police asked him for a search warrant. Because this question arises frequently and is greatly important – and because the Eighth Circuit's position contravenes fundamental Fourth Amendment principles – this Court should grant review to settle the issue.

A. The Federal Courts Of Appeal And State High Courts Are Divided Over This Issue.

Two federal courts of appeal, including the Eighth Circuit here, and two state courts of last resort have held that failing to request a no-knock warrant from a magistrate empowered to give one is irrelevant to assessing the reasonableness of a subsequent police decision, based entirely on foreknown information, to conduct no-knock entry. App. 10a-11a; *United States v. Musa*, 401 F.3d 1208, 1214-16 (10th Cir. 2005) (irrelevant whether officers seek a no-knock warrant "even in those cases where they know beforehand that unannounced or forced entry will likely be necessary") (quotation omitted), *pet'n for cert filed* (Aug. 16, 2005) (No. 05-5861); *Ilo v. State*, 85 S.W.3d 542, 546-48 (Ark. 2002) (same); *State v. Henderson*, 629 N.W.2d 345, 363-67 (Wis. 2001) (same); *see also United States v. Shipley*, 45 Fed. Appx. 706 (9th Cir. 2002) (unpublished opinion) (same). Two other courts have reached this same conclusion. *See Fenner v. Dawes*, 748 F. Supp. 404, 412-13 (E.D. Va. 1990); *State v. Bilancio*, 724 A.2d 278, 282-83 (N.J. App. 1999).

The Eighth Circuit's en banc majority opinion is typical of these decisions. The majority emphasized that *Richards*

upheld a no-knock entry even though the officers had not obtained a no-knock warrant. App. 10a; *accord Ilo*, 85 S.W.3d at 547; *Henderson*, 629 N.W.2d at 363-67. It also relied on this Court's decision in *Dalia v. United States*, 441 U.S. 238 (1979), for the proposition that "it is generally left to the discretion of executing officers to determine the details of how to proceed with the performance of a search authorized by warrant." App. 10a (quoting *Dalia*, 441 U.S. at 257). The majority then summed up its interpretation of the Fourth Amendment: "[I]f the facts known prior to obtaining the warrant justify a no-knock entry, and if no contrary facts are discernable to the officers who execute the warrant, [a] no-knock entry is constitutionally reasonable." App. 11a. Police officers have complete and unfettered authority to invoke their independent judgment in place of an available magistrate's.

Four state high courts in states that permit the issuance of no-knock warrants have adopted the opposite Fourth Amendment rule, taking the position – like the dissent and district court below – that officers may not justify no-knock entries based entirely on facts known at the time they applied for an ordinary warrant. *See State v. Anyan*, 104 P.3d 511, 520, 525 (Mont. 2004) (no-knock entry violated Fourth Amendment because "the exigencies claimed by the State as justification for the no-knock entry were all foreknown by authorities" yet "[t]he court issuing the search warrant was never apprised" of any circumstances allegedly creating an exigency), *cert. denied*, 125 S. Ct. 2544 (2005); *Commonwealth v. Jimenez*, 780 N.E.2d 2, 6 (Mass. 2002) (showing of exigency "must ordinarily be made in advance of the search by affidavit submitted to the magistrate at the time of the warrant application," the exception being "exigent circumstances [that] arise at the threshold of the search justifying both the unannounced entry and the failure to obtain prior judicial

authorization")[3]; *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001) ("Facts justifying an unannounced entry must be presented to the magistrate at the time of application.")[4]; *People v. Lujan*, 484 P.2d 1238, 1241 (Colo. 1971) (officers must knock and announce their presence unless they have a no-knock warrant or circumstances "unknown to the applicant when applying for the warrant" arise during the warrant's execution)[5]; App. 22a-23a nn. 10 & 11 (dissent below); App. 55a-56a (district court).

Two other courts have reached this same conclusion. *See United States v. Dupras*, 980 F. Supp. 344, 349 (D. Mont. 1997) ("[B]ecause the warrant did not authorize a no-knock entry, the police were not entitled to execute a no-knock search absent some exigent circumstance that took place at the scene. None did so the motion to suppress must be granted."); *Carroll v. State*, 817 A.2d 927, 935-36 (Md. App. 2003) (no-knock

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[3] Other Massachusetts cases have fleshed out this rule and the reasoning behind it. *See Commonwealth v. Garner*, 672 N.E.2d 510, 513-14 & n.4 (Mass. 1996) (explaining that *Dalia* "was later qualified by the Supreme Court in *Wilson v. Arkansas* [citation omitted], which required officers to knock and announce their intentions before executing a warrant, except where previously authorized or in exigent circumstances"); *Commonwealth v. Manni*, 500 N.E.2d 741, 742-43 (Mass. 1986) (holding that no-knock entry was invalid because officers lacked a no-knock warrant and "[t]he Commonwealth has not shown that any exigent circumstances, supportive of a no-knock entry, developed after the search warrant was issued"; all relevant facts were known "at the time [the police] obtained the warrant").

[4] For a Minnesota case applying this rule to find a Fourth Amendment violation because officers did not obtain a no-knock warrant and nothing new arose at the threshold of entry, see *State v. Pariseau*, 2001 WL 506601 (Minn. App. May 15, 2001) (unpublished decision).

[5] For a Colorado case confirming that *Lujan*'s rules are based on "the fourth amendment and common law" and finding a no-knock entry invalid, see *People v. Gifford*, 782 P.2d 795, 797 (Colo. 1989). *Lujan* is still the seminal decision in Colorado on no-knock rules. *See* Robert J. Dieter, Colorado Practice: Criminal Practice and Procedure § 12.65 (2d ed. 2004).

entry invalid because officers failed to seek no-knock warrant and there was no "material change in the facts or circumstances surrounding the execution of the warrant between the time it was issued and served"), *rev'd on other grounds*, 859 A.2d 1138 (Md. 2004).[6] And one other federal court of appeals and one other state judge have expressed agreement with this general position in cases where it was unnecessary definitively to resolve the issue. *See United States v. Smith*, 386 F.3d 753, 761-62 (6th Cir. 2004) (rejecting government's argument that a no-knock request was approved *sub silentio* because it appeared in affidavit in support of warrant; "[t]he government's incorporation argument negates the rationale for having a neutral and detached judicial officer review the affidavit and determine whether or not to authorize a no-knock entry"); *State v. Lammers*, 676 N.W.2d 716, 730 (Neb. 2004) (Gerard, J., dissenting) (agreeing with Eighth Circuit's prior position that "when officers know, before searching, of circumstances that they believe justify a no-knock entry, it seems more consistent with the Fourth Amendment to ask a neutral judge for approval before intruding upon a citizen's privacy") (quoting *United States v. Scroggins*, 361 F.3d 1075, 1082 (8th Cir. 2004)).

Capping off the confusion in this area, a panel of the First Circuit recently held a no-knock entry invalid in part because officers "second-guess[ed] a judge's refusal to issue a no-knock warrant on the basis of the same considerations considered by the judge." *United States v. Brown*, 251 F.3d 286, 292-93 (1st Cir. 2001). Contrary to the Eighth Circuit majority's view that *Richards* allows such second-guessing, App. 10a, the First Circuit panel stated that "in light of the critical role Fourth Amendment precedent has historically ascribed to state judicial officers in preventing mistakes and

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[6] The Maryland high court reversed the Court of Special Appeals on the ground that, contrary to the Court of Special Appeals' assumption, no-knock warrants are not authorized under Maryland law. *Carroll*, 859 A.2d at 1148-49.

misconduct," *Richards* could not be extended to allow the officers to decide, based entirely on facts known to the magistrate, to conduct a no-knock entry. *Id.* at 292. The First Circuit, however, vacated this decision and, after rehearing en banc, divided equally on this issue, leaving the law in that jurisdiction still uncertain. *United States v. Brown*, 276 F.3d 14 (1st Cir. 2002) (en banc).[7]

The decisions holding that no-knock entries under the circumstances here violate the Fourth Amendment recognize, as the dissent below did, that neither *Richards* nor *Dalia* resolves the issue. *Richards* stands only for the proposition that facts arising for the first time during an execution of a warrant may justify a no-knock entry without a no-knock warrant. App. 23a n.11 (Heaney, J., dissenting). *Dalia* was not even a knock-and-announce case; it involved executing a warrant by placing a wiretap on a person's business telephone. Accordingly, *Dalia*'s statement that details concerning the execution of warrants "generally [are] left to the discretion of executing officers," 441 U.S. at 257, is nothing more than a "general[]" rule that "was later qualified [in *Wilson*], which required officers to knock and announce their intentions before executing a warrant, except where previously authorized or in exigent circumstances." *Garner*, 672 N.E.2d at 513 n.4; *accord* App. 22a (Heaney, J., dissenting). Unencumbered by an overreading of *Richards* or *Dalia*, these courts have reasoned straightforwardly that officers may not substitute their

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[7] Before the panel opinion in *Brown* was vacated, a district court in the First Circuit applied that decision to hold that a police entry following a truncated knock-and-announcement violated the Fourth Amendment because the police "did not ask for a no-knock warrant" and "no new facts had come to light" when they executed the warrant. *United States v. Sargent*, 150 F. Supp. 2d 157, 158, 162 (D. Me. 2001). The First Circuit reversed the decision on the ground that the officers waited long enough after knocking and announcing, so it did not address the legality of conducting a no-knock entry based on foreknown facts. *United States v. Sargent*, 319 F.3d 4 (1st Cir. 2003).

independent judgment for an available magistrate's because "[t]he fundamental policy undergirding the warrant requirement is just as strong with respect to the no-knock increment." *Carroll*, 817 A.2d at 935-36; *accord* App. 28a (Heaney, J., dissenting).

B. This Is A Pressing Issue That Has Widespread Significance.

This Court should not allow the confusion over this issue to persist. A substantial majority of states allows magistrates to issue no-knock warrants. *See supra* at 8 & n.2. The police frequently know at the time they appear before magistrates of the facts they believe justify executing a warrant without knocking and announcing their presence. The numerous cases discussed above also demonstrate that, all too often (and even sometimes, as here, as a result of a departmental custom or practice), the police in such situations do not obtain no-knock warrants but nevertheless conduct no-knock entries.

This convergence of circumstances means that disputes over whether the Fourth Amendment permits officers to substitute their decisions to conduct no-knock entries for ready and available magistrates' will continue to arise frequently in state courts. And even though federal magistrates are not authorized to issue no-knock warrants, this issue also will continue to arise regularly in federal courts in civil rights lawsuits such as this one, as well as in federal criminal prosecutions that rely on evidence state officers obtain in states allowing no-knock warrants. *See, e.g., Musa*, 401 F.3d at 1214-16; *supra* at 16 n.8. This Court should bring certainty to such cases.

C. The Eighth Circuit's Decision Is Incorrect.

The Eighth Circuit is incorrect that prohibiting no-knock searches under the circumstances here "would be contrary to

the Supreme Court's decisions applying the Fourth Amendment's reasonableness standard." App. 11a.

This Court's general approval of the practice of issuing no-knock warrants (*see Richards*, 520 U.S. at 396 n.7; *Banks*, 540 U.S. at 36) apparently rests on its assessment that the Fourth Amendment prefers that judgments concerning searches of persons' homes "to be made in the first instance by a neutral and detached magistrate." *Mincey v. Arizona*, 437 U.S. 385, 395 (1978). The same is true with respect to the unanimous view, adopted by the Eighth Circuit and others, that the exclusionary rule does not apply when an officer relies in "good faith" on a no-knock warrant, "even if a reviewing court ultimately concludes that the judge [who approved the no-knock request] got it wrong."[8] The law allowing and favoring advance authorizations for no-knock entries, in other words, is grounded in a structural Fourth Amendment principle, not in any particular constitutional text or history condoning the practice.

Once this structural principle favoring a magistrate's involvement is deemed controlling, it follows that when an officer substitutes his judgment concerning the need for a no-knock entry for a ready and available magistrate's, that

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[8] *United States v. Scroggins*, 361 F.3d 1075, 1083-84 (8th Cir. 2004); *see also United States v. Tisdale*, 195 F.3d 70, 72-73 (2d Cir. 1999) ("[T]he issuance of a warrant with a no-knock provision potentially insulates the police against a subsequent finding that exigent circumstances, as defined by *Richards*, did not exist . . . [R]egardless of the existence of exigent circumstances, the officers were entitled to rely on the no-knock provision of the warrant in good faith"); *United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998); *United States v. Carter*, 999 F.2d 182, 186 (7th Cir. 1993); *United States v. Moland*, 996 F.2d 259 (10th Cir. 1993); *State v. Eason*, 629 N.W.2d 625, 649 (Wis. 2001); *State v. Hughes*, 589 N.W.2d 912, 917 (N.D. 1999); *cf. State v. Wasson*, 615 N.W.2d 316, 321 (Minn. 2000) (ruling as a substantive matter that "we may accept evidence of a threat to officer safety of a less persuasive character when the officer presents the request for a no-knock warrant to a magistrate").

officer's actions are constitutionally unreasonable. This Court has explained time and again that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer often engaged in the competitive exercise of ferreting out crime. . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman, or Government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).[9] Thus, just as officers may not rely on their own judgments when

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[9] For similar statements, see *Groh v. Ramirez*, 540 U.S. 551, 557-59 (2004) (describing importance of police obtaining magistrates' approval before searching people's homes) & *id.* at 574-75 (Thomas, J., dissenting) (same); *MacDonald v. United States*, 335 U.S. 451, 455-56 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals or to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home."); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("Informed and deliberate determinations of magistrates . . . are to be preferred over the hurried actions of officers.").

there is ample "time . . . to obtain a search warrant" from a neutral, detached magistrate, *Mincey*, 437 U.S. at 393-95; *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (must get warrant when "practical"), they may not rely on their own judgments when there is a formalized opportunity to seek pre-approval for conducting a no-knock entry.

Although the Eighth Circuit objected that such a rule "might encourage excessive use of the no-knock tactic," App. 11a, just the opposite is true. Current Eighth Circuit law not only protects the police when they obtain no-knock warrants, *see supra* at 16 & n.8; it makes the failure to seek such pre-authorization – and even a magistrate's express refusal to grant it – entirely irrelevant to the Fourth Amendment question whether a no-knock entry is permissible. App. 10a. It is this one-way ratchet – not the dissent's symmetric rule that makes a magistrate's assessment relevant regardless of whether he approves or rejects a request for a no-knock warrant – that is "troubling" to basic Fourth Amendment values, not the least of which is avoiding excessive no-knock entries. *Brown*, 251 F.3d at 292.

II. This Court Should Resolve The Confusion Over The Types Of Police Officers' Suspicions Regarding Illegal Drug Activity And Weapons That Create "Exigent Circumstances" Permitting Officers To Execute A Search Warrant Without Knocking And Announcing.

Even if the absence of a no-knock warrant under the circumstances here were irrelevant, certiorari would still be warranted to give much-needed guidance regarding what kinds of governmental suspicions of exigency justify no-knock entries. During the decade since this Court in *Wilson* explicitly left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment," 514 U.S. at 936, federal courts of appeals and state courts of last resort have adopted

conflicting rules in this respect. It is clear, on the one hand, that officers may not execute a no-knock entry solely because they are conducting a felony drug investigation, *see Richards*, 520 U.S. at 388, or because they suspect that a dwelling's occupant will dispose of evidence of drug dealing. *See Banks*, 540 U.S. at 38 (officers who believed that occupant may try to destroy evidence of cocaine dealing lacked "reasonable suspicion of facts justifying a no-knock entry"). It is equally clear, on the other hand, that officers may dispense with knocking and announcing if, upon their arrival, occupants act threateningly, *see Richards*, 520 U.S. at 395-96, or officers suspect that dangerous drug activity, such as a "methamphetamine cook," is in progress. *See* App. 20a (Heaney, J., dissenting) (collecting cases). What is not clear – and what has divided the courts – is where the line lies in between these poles. The most common such disagreement concerns whether suspicion of illegal drug activity, weapons, and potentially violent individuals, without any particularized evidence of danger, establish exigencies sufficient to conduct no-knock entries. This Court should resolve this conflict.

A. Federal Courts Of Appeal And State High Courts Are Divided Over This Issue.

Courts are divided over whether the suspected presence of three circumstances – illegal drug activity, firearms, and potentially dangerous individuals – justifies no-knock entries in the absence any specific indication of danger. The Eighth Circuit's en banc opinion here makes it one of three federal courts of appeals and two state high courts that have concluded that the presence of these three factors alone, or sometimes only two of them, demonstrates an exigency justifying a no-knock entry. *See* App. 15a; *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (suspicion that armed individual possessed drugs inside room); *United States v. Stowe*, 100 F.3d 494, 499 (7th Cir. 1996) (suspected presence of drugs and firearms is sufficient); *State v. Lopez*, 116 P.3d 80, 85-90

(N.M. 2005) (suspected "illegal drugs" and sawed-off shotguns in house); *State v. Wasson*, 615 N.W.2d 316, 320-21 (Minn. 2000) (suspicion of armed individual and methamphetamine).

In this case, for instance, the police executed a forceful no-knock entry into Petitioner's house based on their suspicions that the house contained a methamphetamine lab and multiple weapons, and that Petitioner's 26-year-old son recently had been arrested for carrying a sawed-off shotgun.[10] When the officers arrived to execute the search warrant, there was no evidence that any methamphetamine lab was operating (there was no chemical smell, for example) or that anyone was even awake. Nor was there any evidence that the son had ever engaged in violence or that he might be even inside the house.[11] Despite the absence of any such particularized dangers, the Eighth Circuit held that "[t]aken together" the

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[10] The Eighth Circuit also noted that the officers believed that the house contained "a stash of drugs for on-going street sales," App. 15a, and suggested (without any basis in the record) that the officers might have been concerned that the suspected drugs were "readily disposable." App. 12a. But this Court held in *Banks* that a suspicion that occupants might dispose of a stash of illegal drugs does not justify a no-knock entry; at most, such a concern justifies waiting a shorter amount of time after knocking and announcing. 540 U.S. at 38. Accordingly, the question whether exigent circumstances justifying the no-knock entry were present here depends solely upon an assessment of danger, not upon any disposability of evidence.

[11] The majority stated at one point that the anonymous tipster alleged that Petitioner's son "lived in the house," App 3a, and later referred to the son a "potentially dangerous *resident*." App. 15a (emphasis added). These statements are incorrect. Here is the tipster's mention of Petitioner's son in its entirety: "The best way to get to know the #1 and #2 suspects is to make friends with the #3 suspect, who is the son. The #3 suspect had recently been arrested for having a sawed off shotgun in his possession." App. 68a. In any event, the police had no particularized reason to believe the son might be in the house when they executed the warrant.

state of affairs "established a reasonable suspicion of exigent circumstances." App. 15a.

In direct contrast to these rulings, two federal courts of appeals and five state high courts have held that combinations of suspected illegal drug activity, firearms, and potentially dangerous individuals do not justify no-knock entries absent a particularized indication of danger. These rulings fall into two categories. Three such courts have concluded, like the dissent and the district court here, that these three factors, without more, do not give rise to exigent circumstances. *See United States v. Smith*, 386 F.3d 753, 759-60 (6th Cir. 2004) (suspected large amount of cocaine, several shotguns, and handguns inside home, as well as presence of at least one potentially dangerous person); *State v. Anyan*, 104 P.3d 511, 514 (Mont. 2004) (suspected methamphetamine lab, person with ammunition, and people with convictions for violent crimes), *cert. denied*, 125 S. Ct. 2544 (2005); *State v. Wright*, 697 N.E.2d 693, 697-98 (Ill. 1998) (suspected presence of firearms, rock cocaine, and gang members).

In *Anyan*, a strikingly similar case decided within months of this one, police officers suspected that occupants of a house were operating a methamphetamine lab. One individual who frequented the house recently had purchased ammunition from a local hardware store. 104 P.3d at 514. Others had prior convictions for violent felonies. *Id.* at 514, 531. After the police executed a search warrant for the home late at night while the house was quiet, the Montana Supreme Court held that the search violated the Fourth Amendment, ruling that neither any "inherent danger in methamphetamine labs" nor any general presence of firearms or potentially dangerous individuals created exigent circumstances. *Id.* at 523-24. The court reasoned that "[t]here must be specific information" indicating danger from drug activity or "lead[ing] the officers to a reasonable conclusion that the presence of firearms raises concerns for officers' safety." *Id.*; *see also Smith*, 386 F.3d at

760 (potentially violent individual does not present particularized danger when there is no evidence that he will be in the house when warrant is executed); *Wright*, 697 N.E.2d at 697-98 (same and noting absence of evidence that those likely to be inside house had engaged in violent acts in the past).

Four other courts, as well as one state appellate court, have concluded that the suspected presence of drugs, coupled with firearms or prior arrests for potentially violent crimes, does not justify no-knock entries. *See United States v. Moore*, 91 F.3d 96, 98 (10th Cir. 1996) (crack cocaine and guns); *State v. Roth*, 674 N.W.2d 495, 503-04 (N.D. 2004) (methamphetamine lab and guns); *State v. Eason*, 629 N.W.2d 625, 632-35 (Wis. 2001) (drugs and prior arrests for potentially violent crimes); *State v. Hughes*, 589 N.W.2d 912, 915 (N.D. 1999) ("drugs such as marijuana" and guns); *Ballard v. State*, 104 S.W.3d 372, 384 (Tex. App. 2003) (methamphetamine lab and guns). And the First Circuit divided evenly on this issue. *United States v. Brown*, 276 F.3d 14 (1st Cir. 2002) (en banc) ("large amounts of cocaine," prior drug arrest, and at least one firearm). The scenarios in these various cases, of course, are quite similar to this one, since the officers here had no specific information that Petitioner's son was in the house – and arguably not even a reasonable basis to suspect he had been arrested in the first place, since the officers executing the warrant knew that the police department had not even bothered to check in its own files to see whether the tip was accurate in this respect.

The set of facts here, in short, rests at the fulcrum of the diverging approaches courts across the country have taken in implementing the exigent circumstances standard. This case thus frames and illuminates a conflict that only this Court can resolve.

B. This Issue Is Critical To Individual Safety And To The Proper Regulation Of Police Practices.

The knock-and-announce rule is not a mere formality. It is grounded in "the reverence of the law for the individual's right of privacy in his house," *Miller v. United States*, 357 U.S. 301, 313 (1958), and is designed to avoid unnecessary "destruction or breaking of any house" and the threats to life and limb that can ensue when a person believes his home is being raided by intruders. *Wilson*, 514 U.S. at 935-36 (quotation omitted); *see also Banks*, 540 U.S. at 37 (discussing concern for homeowner's property); *Richards*, 520 U.S. at 393 n.5 (property and personal wellbeing); *Anyan*, 104 P.3d at 517 (threats to life and limb); *State v. Richards*, 549 N.W.2d 218, 231 (Wis. 1996) (Abrahamson, J., concurring) (citing various sources detailing "the often lethal risks that no-knock entries can pose to both law enforcement officers and the individuals whose homes they enter"). It is, therefore, vital that the police's need for a forceful and unannounced execution of a search warrant outweigh the risks.

Although the time that officers must delay their entry after knocking may sometimes not be long, *see, e.g., Banks*, 540 U.S. at 38 (15-20 second delay sufficient), that brief interlude, during which homeowners have an opportunity "to comply with the law," *Richards*, 520 U.S. at 393 n.5, can make the difference between life and potential death. Had Petitioner been given the opportunity to let the police in peacefully, he in all likelihood would not have gotten shot in a mistaken attempt to defend his home from burglars. And this case is not unique. Instances, unfortunately, abound in which officers' no-knock entries have led to innocent homeowners being killed or seriously injured,[12] not to mention even more cases involving

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[12] *See, e.g., Leaf v. Shelnutt*, 400 F.3d 1070, 1074-75 (7th Cir. 2005) (police shot and killed innocent man who they startled during no-knock entry); *Anyan*, 104 P.3d at 517-18 (no-knock entries, especially during the night, are a "recipe for tragedy" that can result in "misunderstanding[s] with

substantial damage to private property. Unannounced entries also can harm "the police themselves who might be mistaken for prowlers and shot down by a fearful householder." *Miller*, 357 U.S. at 313 n.12; *see also State v. Carufel*, 314 A.2d 144, 147 (R.I. 1974) (collecting instances where homeowners took "defensive measures [they] otherwise would not have taken" had they known that police were present with a valid warrant). This Court should grant review to ensure that these tragic altercations occur as rarely as possible.

Even apart from concerns for life and limb, lower courts, attorneys and law enforcement need instruction concerning what kinds of suspicions justify no-knock entries. In *Anyan*, the recent case with strikingly similar facts to this one, the State of Montana petitioned for certiorari, supported by twenty-three other States, seeking "additional guidance" from this Court regarding the "important" Fourth Amendment issues the case raised. Petition for Certiorari at 1, 16-17, *Montana v. Anyan*, 125 S. Ct. 2544 (2005) (No. 04-1318); *see also* Brief of States of Alabama, et al. as *Amici Curiae* in Support of Petitioner, *Montana v. Anyan*, 125 S. Ct. 2544 (2005) (No. 04-1318). Whatever this Court's reason for foregoing review in that particular case, Petitioner agrees with these States that additional guidance from this Court is sorely needed.

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horrific consequences"); Sean Kelly et al., *Police Kill Man in Bed*, Denver Post, July 13, 2004, at A1 (shooting of innocent man); Al Guart, *"Spruill" Effects on Drug Busts*, N.Y. Post, Jan. 25, 2004, at 16 (heart attack of 57-year old resident because of no-knock raid based on faulty information); Sharon Dolovich, *Invasion of SWAT Teams Leaves Trauma and Death*, L.A. Times, Sept. 22, 2000, at B9 (discussing several deaths caused by SWAT team's no-knock entries, including one where "no drugs were found, and no member of the family was charged with any crime"); James Bovard, *No-Knock Entries by Police Take Their Toll on the Innocent*, Christian Sci. Monitor, May 24, 1994, at 18 (describing numerous tragedies where police conducted no-knock entries based on erroneous tips).

C. The Eighth Circuit's Decision Is Incorrect.

Although this Court has said very little regarding what kinds of facts constitute exigent circumstances allowing police to execute no-knock entries, this Court's precedent indicates that the Eighth Circuit majority's analysis is incorrect. In holding in *Richards* that police may not execute no-knock entries simply because they are searching for drug activity, this Court emphasized that courts must determine whether the facts and circumstances of each "particular entry" justify dispensing with the knock-and-announce requirement. 520 U.S. at 394. The Fourth Amendment does not tolerate "blanket exception[s]" to the knock-and-announce requirement. *Id.* at 395.

As the dissent here recognized, the Eighth Circuit's ruling that exigent circumstances arise from a suspicion of drug activity, coupled only with a generalized suspicion of weapons and a potentially dangerous individual, smacks of an illegitimate "blanket exception." App. 25a (Heaney J., dissenting). Police should have to do at least a little bit more investigation before deciding to damage and invade someone's home. When officers are searching for drug activity, such as a methamphetamine lab, the presence of odors or evidence of large-scale manufacturing may create an exigency. *See, e.g., United States v. Walsh,* 299 F.3d 729, 734 (8th Cir. 2002). When officers believe an individual is potentially dangerous, a reasonable suspicion that he engaged in violence in the past and is actually inside the house to be searched may create an exigency. *See, e.g., United States v. Musa*, 401 F.3d 1208, 1214 (10th Cir. 2005) (belief that person with prior assaults against police officers would be in house); *State v. Jones*, 846 A.2d 569, 586-87 (N.J. 2004) (same). Even when no such evidence exists, an exigency may develop when officers arrive at the house or after they knock at the door. *See, e.g., Richards,* 520 U.S. at 395-96 n.7 (exigency developed when occupants notice officers and began to flee). Here, however,

the officers had no particularized knowledge of danger before arriving at the scene, and no exigency developed while executing the warrant. App. 17a-18a (Heaney, J., dissenting).

In the absence of any particularized danger, the Eighth Circuit majority defended its ruling by quoting *Richards* for the proposition that the burden to show a reasonable suspicion of exigent circumstances "is not high." App. 15a (quoting *Richards*, 520 U.S. at 394). But *Richards*' use of that phrase referred merely to the difference between a "reasonable suspicion" standard of certitude and a "probable cause" standard; it did not mean to suggest, as the Eighth Circuit apparently took the phrase, that particularized facts do not need to support determinations of exigency. Indeed, in other areas where the Fourth Amendment requires a reasonable suspicion to act, this Court steadfastly demands that the police to make particularized showings. *See, e.g., United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("particularized" showing needed for *Terry* stops). Knock-and-announce law should be no different.

III. This Case Is An Excellent Vehicle For Clarifying The Uncertainties In This Court's Knock-And-Announce Jurisprudence.

Three attributes of this case makes it an excellent vehicle for clarifying the uncertainties that currently plague knock-and-announce jurisprudence.

First, this case presents both of the issues respecting the propriety of conducting no-knock entries that most deeply divide the lower courts. Other cases may not come from states allowing no-knock warrants, or they may not present serious questions regarding whether the officers' suspicions created exigent circumstances. This case squarely implicates both areas of confusion.

Second, the Fourth Amendment issues here are unquestionably outcome determinative. The jury found the members

of the Board of Police Commissioners liable under § 1983 in their official capacities (*see* App. 60a) for maintaining a departmental policy of never knocking and announcing before executing search warrants on suspected drug houses. App. 31a-32a, 60a, 64a-65a. That finding supports the full amount of the verdict here and stands or falls according to whether the police officers' no-knock entry in this case violated the Fourth Amendment. *See supra* at 5. There are no qualified immunity complications involved. *Id.*

The procedural posture here, therefore, is far preferable to an appeal of a criminal conviction. In the criminal context, violations of the Fourth Amendment can be harmless. This Court also is considering this Term whether the inevitable discovery doctrine renders the exclusionary rule inapplicable to violations of the knock-and-announce rule. *See Hudson v. Michigan*, No. 04-1360 (cert. granted June 27, 2004). If this Court holds that the exclusionary rule does not apply to such violations, then it may be difficult, if not impossible, to review the questions presented here in any criminal case.

Third, the fact that this Court will be reviewing the knock-and-announce doctrine in *Hudson* makes this the perfect time to address the questions presented here. Considering both cases at once would maximize this Court's limited resources. In a single term, this Court could, and should, consider the knock-and-announce doctrine holistically and give comprehendsive guidance to lower courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

David Doran, Plaintiff-Appellee, v. Dennis Eckold, in his official capacity as President of the Board of Police Commissioners of Kansas City, et al., Defendants-Appellants,	No. 03-1810 OPINION

Appeal from the United States District Court
for the Western District of Missouri

Submitted: October 20, 2004
Filed: June 6, 2005

Before LOKEN, Chief Judge, HEANEY, WOLLMAN, MORRIS SHEPPARD ARNOLD, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER and BENTON, Circuit Judges, en banc.

OPINION

LOKEN, Chief Judge.

At 10:00 p.m. on the evening of August 11, 1998, Kansas City police executed a warrant to search the home of

David Doran for drugs and other contraband, using a tactic called "dynamic entry." Officer Ty Grant, serving as "ram officer," yelled "Police, search warrant," and immediately hit the front door with his ram, breaking in on the third hit. Officer Mark Sumpter as point man entered the house before its occupants had time to answer the door. When Sumpter reached the kitchen doorway, he saw Doran running toward him pointing a handgun. Sumpter testified that he yelled, "Police, search warrant, get down," and fired when Doran did not lower his weapon. Doran was hit twice, sustaining serious injuries. He commenced this action under 42 U.S.C. § 1983, asserting Fourth Amendment damage claims against Officer Sumpter for use of excessive force; the investigating officer, Wesley Williamson, for an illegal warrant search; Officer Grant for illegal entry; Sergeant Eric Greenwell for failure to supervise Grant; and the Board of Police Commissioners for failure to train its officers regarding the Fourth Amendment restrictions on no-knock entries and for deliberate indifference to a custom and practice of no-knock entries.

At trial, Doran testified he was asleep when he heard the ramming. Thinking the noise was a break-in or a fight on the front porch, he grabbed a pistol from under his pillow, ran into the kitchen, saw laser lights and realized it was the police, and bent to set his gun on the floor when he was shot. After a four-day trial, the jury found in favor of Officer Sumpter, rejecting Doran's excessive force claim. However, the district court ruled as a matter of law that exigent circumstances did not justify the no-knock entry. As a result, the jury instructions on the illegal entry claim against Officer Grant and the failure-to-train claim against Sergeant Greenwell virtually directed a verdict in favor of Doran on those claims. The jury returned a verdict in excess of two million dollars for Doran on those claims and on his claims against the Board, finding that Doran's injuries were the direct result of the Fourth Amendment violations. The district court entered judgment on this verdict. Grant, Greenwell, and the Board appeal, arguing

inter alia that exigent circumstances justified the no-knock entry. We agree and therefore reverse.

BACKGROUND

In July 1998, Kansas City Police received an anonymous tip about criminal activity allegedly occurring at the Doran home. The tipster alleged:

- that methamphetamine was being manufactured at the house to be searched;
- that Doran was selling crack cocaine and methamphetamine at the front door throughout the day;
- that drugs were stored in dresser drawers throughout the house;
- that guns were kept in the bedroom; and
- that Doran's 26-year-old son Joseph lived in the house and had recently been arrested for possessing a sawed-off shotgun.

Narcotics Detective Wesley Williamson verified the house's location, determined that cars parked at that location were registered to the Doran family, and collected bags of trash in front of the residence. In the trash, he found fifty sandwich bags with the corners cut out, a common way for traffickers to package and distribute narcotics; methamphetamine residue in two plastic bags, three plastic sandwich bag corners, and a pill bottle; an empty box of a "Dristan" product that contains pseudoephedrine, often used in the manufacture of methamphetamine; and mail tending to confirm that the trash belonged to the Dorans. Detective Williamson recited these facts in a warrant application and obtained a warrant to search the Doran home.

The task of executing the warrant was assigned to the Police Department's Street Narcotics Unit, a specialized unit

whose primary function is to execute search warrants, usually on drug houses. Sergeant Greenwell was in charge of the Unit's entry team. Before executing the warrant, Greenwell reviewed the warrant and warrant affidavit, learning about the illegal activity alleged in the anonymous tip. Sergeant Greenwell and Detective Williamson then drove by the Doran house to verify its location and to "determine any tactical concerns." Based on this information and his experience with methamphetamine labs, Sergeant Greenwell concluded that this would be a high-risk entry and instructed his team to make a dynamic entry.

On the evening of August 11, the entry team gathered at an assembly point a few blocks from the Doran home. Because of the hazards associated with methamphetamine labs, Greenwell arranged for a fire department pumper and an ambulance to wait at the assembly point. Members of the entry team other than Officer Grant wore respirators to reduce the risk from chemical fumes. After Sergeant Greenwell briefed the entry team, the team proceeded to Doran's house and executed the warrant. Doran was shot soon after Officer Sumpter entered the house. The police completed the search after tending to Doran, finding one ounce of marijuana in the son's room but neither a methamphetamine lab nor other illegal drugs. Doran was not charged with an offense. This lawsuit followed.

THE DISTRICT COURT'S RULINGS AND THE RECORD ON APPEAL

Prior to trial, all defendants moved for summary judgment on Doran's various § 1983 claims. As relevant here, the court granted Detective Williamson summary judgment on Doran's claim of illegal search, concluding that Williamson had sufficiently verified the anonymous tip to have "an objectively reasonable belief in the existence of probable cause for the issuance of a search warrant." Doran dropped his remaining claim against Williamson for unlawful execution of

the warrant. Eliminated as a defendant, Williamson – who by then had become an agent of the federal Bureau of Alcohol, Tobacco, and Firearms – did not testify at trial. The district court denied Officer Sumpter summary judgment on Doran's excessive force claim. The court also denied Grant, Greenwell, and the Board summary judgment on Doran's claims relating to the no-knock manner in which the warrant was executed, concluding "there is insufficient evidence of exigent circumstances to justify dispensing with the knock and announce requirement," and there were material fact disputes over whether the entry team announced, knocked, and waited an appreciable period before entering.

Though the district court reserved a final ruling on Doran's knock-and-announce claims because of potential fact disputes, the court properly recognized that the question of exigent circumstances, like the ultimate issue of Fourth Amendment reasonableness, is an issue of law for the court. *See United States v. Cooper*, 168 F.3d 336, 339 (8th Cir. 1999); *United States v. Mattison*, 153 F.3d 406,410 (7th Cir. 1998). Therefore, both before and during the trial, the district court excluded evidence that was relevant to the question of exigent circumstances, even if it was part of the summary judgment record on the issue, if it was either unduly prejudicial or not relevant to fact issues to be decided by the jury. For example, because the court excluded evidence 'tending to challenge the lawfulness of the valid search warrant, the warrant and warrant affidavit were not offered at trial. Similarly, the police "DRAGNET" report summarizing the anonymous tip was not admitted into evidence because it contained a potentially prejudicial reference to the son's alleged arrest for possession of a sawed-off shotgun.

The court made its final ruling on the exigent circumstances issue during the instructions conference held at the close of the trial evidence. Consistent with its pretrial summary judgment ruling, the district court "ruled as a matter

of law that there were not exigent circumstances which permitted the waiver of the knock or wait rule, and we'll not be submitting that to the jury." In making this ruling, the court declared that it considered "all of the evidence which is admissible during the course of trial, as well as Plaintiff's Exhibit 8 [the DRAGNET tip report] ... [and] all of the evidence that, in fact, has been presented to me." Neither party objected to the court considering evidence that was only presented during pretrial motion proceedings to decide the legal issue of whether exigent circumstances justified the no-knock entry. Indeed, given the need to withhold irrelevant or unduly prejudicial information from the jury's consideration, we agree with the district court's approach to this issue, though our task on appeal would be easier if the court had defined more precisely what evidence not in the trial record "has been presented to me." Therefore, we will review the same record that the district court considered in making its legal determination of no exigent circumstances.[1]

THE CONTROLLING LEGAL STANDARD

In *Wilson v. Arkansas*, the Supreme Court held for the first time that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." 514 U.S. 927, 929 (1995). The Court cautioned, however, that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." *Id.* at 934. The Court noted examples of circumstances that may justify an unannounced entry, such as a threat of physical violence or the likely destruction of

[1] For this reason, we grant appellee's motion to take judicial notice of the search warrant and supporting affidavit, and appellants' motion to file a supplemental appendix containing Plaintiffs Exhibit 8, materials presented to and considered by the district court at the summary judgment stage but not admitted at trial.

evidence, but declined to "attempt a comprehensive catalog of the relevant countervailing factors." *Id.* at 935-36.

The Court has applied this general principle in three subsequent cases. In *Richards v. Wisconsin*, the Court rejected a state supreme court's decision to adopt a blanket exception to the Fourth Amendment's knock-and-announce requirement when police execute a search warrant in a felony drug investigation. 520 U.S. 385, 388 (1997). Though acknowledging "that felony drug investigations may frequently present circumstances warranting a no-knock entry," the Court held that a case-by-case analysis of the facts of a particular entry is nonetheless required:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard – as opposed to a probable-cause requirement – strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. This showing is not high . . . .

Id. at 394 (citations omitted). The Court went on to hold that the no-knock entry at issue was reasonable and affirmed the judgment of the state court.

In *United States v. Ramirez*, the Court reversed a Ninth Circuit holding that more than a "mild exigency" must be shown to justify a no-knock entry in which property is destroyed. 523 U.S. 65, 69-70 (1998). In *Ramirez*, a reliable confidential informant told police that he had seen a violent prison escapee at the Ramirez home and that Ramirez might

have a stash of guns and drugs in his garage. The Court held that the police "certainly had a 'reasonable suspicion' that knocking and announcing their presence might be dangerous to themselves or to others," so it was "clearly reasonable" to break a garage window during the no-knock entry. *Id.* at 71-72.

Finally, in *United States v. Banks*, the Court rejected the Ninth Circuit's "four-part scheme for vetting knock-and-announce entries." 540 U.S. 31, 41 (2003). In *Banks*, police executing a warrant to search for cocaine arrived at the premises to be searched with no reasonable suspicion justifying a no-knock entry and waited only fifteen or twenty seconds after the initial knock before entering. Emphasizing again that the totality of the circumstances must be examined to determine whether exigent circumstances exist, the Court held that the risk of imminent drug disposal was an exigency that justified the forcible entry. *Id.* at 40.[2]

DISCUSSION

The district court explained the bases for its exigent circumstances ruling in an opinion denying defendants' post trial motions. The court emphasized that the police did not obtain a no-knock warrant to search the Doran home. The court also cited the following additional factors as supporting its conclusion that exigent circumstances did not justify Officer Grant's no-knock entry:

- The facts known to the police as they approached the Doran house were the same facts known when they applied for the warrant.

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[2] The Court noted in *Ramirez*, 523 U.S. at 73, that its decisions in *Wilson* and *Richards* "serve as guideposts in construing" the exigent circumstances exception to 18 U.S.C. § 3109. *Accord Banks*, 540 U.S. at 42-43. Thus, our contrary statement in *United States v. Tavares*, 223 F.3d 911, 916 n.5 (8th Cir. 2000), is overruled.

- The anonymous tip did not come from a reliable confidential informant, and the information was not verified or corroborated.

- The tip that drug sales were occurring at the Doran house was not corroborated by a controlled buy or surveillance.

- The trash search uncovered drug residue, but no evidence linked the trash to Doran's house.

- The police did not check the criminal history of Doran and his wife, which would have revealed no prior arrests.[3]

- The allegation that Doran's son was recently arrested for possession of a sawed-off shotgun was not verified.

- The entry team conducted no surveillance to determine if the son was home or lights were on before the nighttime entry.

- Officer Grant routinely operated the ram as he did in this case – announce "police, search warrant," and simultaneously break in with the ram without otherwise knocking or waiting for a response.

We review the district court's exigent circumstances ruling *de novo*. *Cooper*, 168 F.3d at 339. The district court's

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[3] Regarding Mrs. Doran, who did not testify, the court's statement appears to be based on assertions in various memoranda filed by Doran's attorneys, who also filed a motion in limine in September 2002, some three months before trial, seeking an order excluding evidence that Mrs. Doran and her sister "had criminal records involving illegal drugs and/or prostitution." As the motion in limine was granted, the criminal history facts are not in the record on appeal. It is undisputed that the police investigators did not do criminal history checks on the Dorans and their son prior to obtaining and executing the search warrant.

analysis of the exigent circumstances issue is contrary to the Supreme Court's knock-and-announce decisions in significant respects. First, the district court erred in emphasizing the absence of no-knock authority in the search warrant. As the Court said some years ago in *Dalia v. United States*, 441 U.S. 238, 257 (1979):

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that . . . search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

In *Richards*, the Supreme Court confirmed this principle when it upheld a no-knock entry based on what the officers encountered when executing the warrant, *even though the issuing magistrate had denied a request for a no-knock warrant*. 520 U.S. at 395-96 & n.7; *see Banks*, 540 U.S. at 36-37. Of course, state law may require, by statute or judicial decision, that law enforcement officers who have reason to believe that exigent circumstances justify a no-knock entry include a request for that authority in the warrant application. *See Davis v. State*, 859 A.2d 1112, 1124-26 (Md. 2004) (collecting conflicting authorities from various States). But for Fourth Amendment purposes, the relevant question is whether the police have reasonable suspicion of exigent circumstances at the time they execute the warrant.

Second, the district court erred in emphasizing that the facts known to the police as they approached the Doran house were the same facts known when they applied for the warrant.

To be sure, many exigent circumstances cases have turned on facts that unfolded as the police approached the house to be searched, or after they initially knocked. *See, e.g., Richards*, 520 U.S. at 388-89. But the Fourth Amendment analysis turns on the totality of the circumstances, including facts gathered by the police before they applied for the warrant. *See United States v. Scroggins*, 361 F.3d 1075, 1081-82 (8th Cir. 2004). The district court's approach would *require* that the police request no-knock authority whenever the basis for a warrant application might justify a no-knock entry. Such a rule might encourage excessive use of the no-knock tactic and would be contrary to Supreme Court decisions applying the Fourth Amendment's reasonableness standard. Therefore, if the facts known prior to obtaining the warrant justify a no-knock entry, and if no contrary facts are discernable to the officers who execute the warrant, the no-knock entry is constitutionally reasonable.

Third, the district court concluded that the prior investigation by "the police" was inadequate and then attributed these inadequacies to the Street Narcotics Unit officers brought in solely to execute the warrant. This analysis of the police conduct in gross would be proper in deciding a motion to suppress evidence in a criminal prosecution of Doran arising out of the search. But § 1983 liability is personal. The question here is whether the conduct of Officer Grant and Sergeant Greenwell was constitutionally unreasonable. The answer to that question must take into account the settled principle that law enforcement officers may rely on information provided by others in the law enforcement community, so long as the reliance is reasonable. *See United States v. Hensley*, 469 U.S. 221, 232 (1985); *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); *Brown v. Nutsch*, 619 F.2d 758, 764-65 (8th Cir. 1980).

Fourth, the district court relied on the fact that Officer Grant "routinely operated the ram as he did in this case." But

Sergeant Greenwell made the decision to make the no-knock entry after evaluating all the circumstances and assigned Officer Grant the role of ram officer. Having been briefed by Sergeant Greenwell, Grant had no constitutional duty to verify that exigent circumstances attended execution of the warrant before carrying out his assignment. Greenwell testified that he often assigned Grant the role of ram officer for high-risk entries. Thus, Grant's testimony that he employed the dynamic entry tactic whenever he was assigned to be ram officer said nothing about the prevalence or reasonableness of the tactic and did not establish a Fourth Amendment violation.

In addition to these faulty legal premises, the district court's exigent circumstances analysis gave undue weight to certain portions of the pretrial record, while ignoring others. The court focused on what it considered to be an incomplete investigation to verify the anonymous tip. But the court brushed aside the most significant corroborating evidence – the trash search – because "there was no evidence that the drug residue or the trash bag in which it was found was linked to the Doran residence." The evidence was that four trash bags were collected from in front of Doran's house. The bags contained drug residue and pieces of mail addressed to the Dorans. Even if Detective Williamson did not testify that the mail and the drug residue came from the same bag, it was wrong to conclude that the trash search did not corroborate critical aspects of the anonymous tip. The tip reported daily drug sales from the house, suggesting the presence of small quantities of narcotics that are readily disposable; the trash contained multiple sandwich bags with the corners cut. The tip reported on-going manufacture of methamphetamine; the trash contained six different containers with methamphetamine residue. Moreover, the court's statement that the trash "contained no evidence of any of the chemicals or apparatus used to make methamphetamine" was simply wrong. The trash contained an empty box of a product containing pseudoephedrine, a methamphetamine precursor. Of course,

one box of Dristan does not confirm the presence of a meth lab. But the fact-finding underlying the district court's exigent circumstances ruling was nonetheless clearly erroneous. The trash analysis tended to show that the anonymous tip was "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

There remains the question whether exigent circumstances justified Sergeant Greenwell's decision to use the no-knock method of executing the warrant to search Doran's house. Before executing the warrant, Greenwell reviewed the warrant and warrant affidavit, interviewed the investigating officer, and drove by the Doran house. This was a reasonable level of research for the head of a team brought in to execute the warrant. Greenwell learned that the house was suspected of harboring a clandestine methamphetamine lab. That fact has justified no-knock entries in prior cases.[4] Consistent with these cases, Greenwell testified at trial:

> Q. What kind of dangers do you encounter in terms of officer safety when you enter . . . what you presume to be a meth lab?
>
> A. Well, besides the obvious danger of drugs and firearms . . . you have a lot of added problems . . . . The chemicals and the types of products that individuals use to manufacture methamphetamine are very volatile, combustible, ha[ve] caused explosion, fire, things of that nature.

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[4] *See United States v. Tucker*, 313 F.3d 1259, 1265-66 (10th Cir. 2002) (nighttime execution justified by public safety exigency); *United States v. Keene*, 915 F.2d 1164, 1168-69 (8th Cir. 1990) (destruction of evidence), *cert. denied*, 498 U.S. 1102 (1991); *United States v. Spinelli*, 848 F.2d 26, 29-30 (2d Cir. 1988) (public safety); *cf. United States v. Walsh*, 299 F.3d 729, 733-34 (8th Cir.) (warrantless search authorized by public safety exigency), *cert. denied*, 537 U.S. 1066 (2002).

> We carry specific types of equipment to help make our entry safer . . . and we train the [officers] to evacuate if those detectors . . . tell us . . . the environment is superseding our personal protective equipment.
>
> * * * * *
>
> Q. [H]ave you ever been in a lab where somebody tried to destroy it?
>
> A. Yes. We've been in a situation before where suspects could flee and knock over parts of the lab. . . . Sometimes they destroy the lab in an attempt to cause harm to us on the entry team and sometimes trying to destroy evidence. . . .
>
> Q. Okay. Is there any kind of gas danger?
>
> A. Gas, there's a phosphine gas danger. . . . [I]f they cook the product too long, [methamphetamine labs] can emit phosphine gas, which is highly deadly.

Greenwell also learned that ongoing drug street sales had been reported and that numerous weapons were kept in the house, facts that have justified no-knock entries in numerous cases.[5] Finally, he learned that Doran's son had recently been arrested for possession of a sawed-off shotgun. Though this tip later turned out to be inaccurate, reasonable suspicion that an armed

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[5] *See United States v. Washington*, 340 F.3d 222, 227 (5th Cir.), *cert. denied*, 540 U.S. 1081 (2003); *United States v. Gambrell*, 178 F.3d 927, 928-29 (7th Cir.), *cert. denied*, 528 U.S. 920 (1999); *Mattison*, 153 F.3d at 410-11; *United States v. Singer*, 943 F.2d 758, 761-63 (7th Cir. 1991); *State v. Baker*, 103 S.W.3d 711, 717-19 (Mo. 2003) (en banc).

and potentially dangerous resident will be present has frequently justified no-knock entries.[6]

Taken together, as we must do in assessing the totality of the circumstances, we conclude that this information, plus Williamson's trash run, established a reasonable suspicion of exigent circumstances. The burden to show a reasonable suspicion of exigent circumstances "is not high." *Richards*, 520 U.S. at 394. In this case, the head of a team brought in to execute the warrant learned that the house to be searched was suspected of harboring a clandestine methamphetamine lab, a stash of drugs for on-going street sales, multiple weapons, and a potentially violent resident. It was constitutionally reasonable for Sergeant Greenwell, the head of this special team, to rely on what he learned from reading the warrant documents and from interviewing the investigating officer, Detective Williamson. It was constitutionally reasonable for Officer Grant to perform his assigned duty as ram officer as he had been trained to carry out that task in cases of high-risk dynamic entries. "In making the determination of whether the Fourth Amendment has been violated by a failure to knock and announce, we must remember reasonableness is our polestar." *United States v. Mendoza*, 281 F.3d 712, 717 (8th Cir.), *cert. denied*, 537 U.S. 1004 (2002). Accordingly, the unlawful entry claim against Grant and the unlawful entry and failure-to-train claims against Greenwell should not have been submitted to the jury.

Because the individual defendants did not violate Doran's constitutional rights, his failure-to-train and custom and practice claims against the Board of Police Commissioners should not have been submitted to the jury. *See Roach v. City*

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[6] *See United States v. Nguyen*, 250 F.3d 643, 645 (8th Cir. 2001); *United States v. Gay*, 240 F.3d 1222, 1228-29 (10th Cir.), *cert. denied*, 533 U.S. 939 (2001); *United States v. Weeks*, 160 F.3d 1210, 1213-14 (8th Cir. 1998); *United States v. Murphy*, 69 F.3d 237, 243 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996).

of Fredericktown, 882 F.2d 294, 297-98 (8th Cir. 1989). The judgment of the district court is reversed, and the case is remanded with directions to dismiss the complaint.

HEANEY, Circuit Judge, with whom MORRIS SHEPPARD ARNOLD, BYE, and SMITH, Circuit Judges, join, dissenting.

I respectfully dissent, primarily for the reasons so eloquently stated in the panel majority opinion, authored by Judge Richard S. Arnold. *See Doran v. Eckold*, 362 F.3d 1047 (8th Cir. 2004). In that opinion, Judge Arnold fully considered appellants' argument that the district court erred when it ruled as a matter of law that exigent circumstances did not justify the no-knock entry into the Dorans' home. Recognizing the significance that the Supreme Court has placed upon the Fourth Amendment right to privacy in one's home, he concluded that:

> "the police should be required to make [a showing of exigency] whenever the reasonableness of a no-knock entry is challenged." The burden of proving exigency "is not high." Even so, there is some flesh to the burden, and we do not think the police sufficiently demonstrated that exigent circumstances existed to justify their "dynamic entry" into the Doran home.

Id. at 1051 (alteration in original) (citations omitted) (quoting *Richards v. Wisconsin*, 520 U.S. 385 (1997)). I believed Judge Arnold was right then, and continue to believe so now.

The en banc majority holds that Sergeant Eric Greenwell and Officer Ty Grant acted reasonably in concluding that exigent circumstances justified their no-knock entry into the Dorans' home. According to the record,[7] their entry was based

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[7] During oral argument, a question was raised as to whether we should rely solely on the trial record or whether we should follow the district court and consider the pre-trial record as well. While a strong case can be made for

on a pre-search briefing, a conversation with Detective Wesley Williamson, and their independent review of the search warrant and affidavit. This investigation made clear that the information that appellants now contend justified the no-knock entry was based on an anonymous tip from a person with no previous record of reliability. The tipster alleged that Doran was making methamphetamine, as well as dealing methamphetamine and crack cocaine all day in face-to-face transactions from the front door of his house. The tipster asserted that Doran's son, who lived at the house, had recently been arrested for possession of a sawed-off shotgun. Despite the obvious ease with which officers could have confirmed whether the allegations in the tip were true, there was an utter failure to do so. There is *no* evidence in the record that any officer checked the Doran family's criminal history to see whether they had dealt controlled substances in the past or had a history of violent acts. There is *no* evidence any officer checked the younger Doran's arrest history to see if the anonymous tip was accurate regarding the sawed-off shotgun. There is *no* evidence that any officer verified whether the younger Doran, in his mid-twenties at the time of the search, lived at the house. There is *no* evidence that officers observed any drug traffic at the Doran residence. There is *no* evidence that any officer

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the former, Judge Arnold, writing for the original panel, considered the entire record, and I agreed with that decision. I continue to do so here. In his dissent to the panel opinion, Chief Judge Loken stated that "the court erred in failing to specify the record on which its ruling was based and on relying on inferences drawn from pretrial proceedings rather than on the facts proved at trial." *Doran* at 1055. Apparently, Chief Judge Loken has now changed his mind. *Compare ante* at 5 (approving the district court's consideration of matters outside the trial record in determining if exigent circumstances exist). If we were to limit ourselves to the trial record, a no-knock search here would be clearly unreasonable: the only evidence before the jury was that Greenwell and Grant were aware that the information about the possibility of a methamphetamine lab and weapons in the Doran house came from an uncorroborated, anonymous tipster with no record of reliability.

engaged in a controlled buy at the residence. And, importantly, there is *no* evidence that any officer observed anything that would point to the existence of a methamphetamine lab. As Judge Arnold put it,

> Here, the police supported their safety concern by pointing to the following evidence: an anonymous, uncorroborated tip that the Dorans were buying and making methamphetamine; the uncorroborated statement that the younger Mr. Doran had been arrested for illegal firearm possession; the uncorroborated statement that there were guns in the house; and drug residue in a trash bag outside the home. Thus, there was almost no certainty to most of the information the police reportedly "knew." Had the police done even some investigation or surveillance they would have had a better understanding of whether the Dorans posed a security risk justifying a no-knock entry. Instead, they relied on very sketchy information, a reliance we find unreasonable, and outweighed by the privacy interest the Fourth Amendment is meant to protect.

Doran, 362 F.3d at 1053.

Before the en banc court, appellants argued that the anonymous tip was sufficiently corroborated, directing us to four trash bags seized from outside the Dorans' home.[8] Inside these bags, according to Williamson, he found fifty sandwich

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[8] Before the original panel, appellants primarily focused their argument on the lack of proximate cause to support the damage awards. Neither party sought to supplement the record with the pretrial material that the majority finds dispositive until this stage in the litigation. *See Doran*, 362 F.3d at 1050 ("The warrant and warrant affidavit were not offered into evidence and are not part of the record on appeal."). The trash bags and their contents have never been a part of this record.

bags with the corners cut, which he asserted was consistent with narcotics packaging. He also found methamphetamine residue on two plastic bags, a pill bottle, and three other pieces of plastic. Lastly, he observed a single empty box of cold medication, which contained pseudoephedrine.

As Judge Arnold noted in the panel decision, although officers may have suspected (based on an anonymous tip) that Doran was involved in the manufacture of methamphetamine, "the police did no corroborating investigation to show that the Dorans were either selling or making methamphetamine. While [appellants] point to the trash test, such evidence, at best, points to use, and certainly does not demonstrate any of the potential concerns raised by an alleged meth lab, which might, if properly developed, justify disregarding the knock-and-announce rule." *Doran*, 362 F.3d at 1052 n.3. Even if the contents of the trash bag may have suggested that Doran was selling methamphetamine, there was no evidence whatsoever that Doran was currently operating an active methamphetamine lab. Our cases have gone to great lengths to detail the type of evidence linked to the existence of an active lab. *See, e.g., United States v. Lloyd*, 396 F.3d 948, 954 (8th Cir. 2005) (noting that the strong smell of ether is indicative of an active methamphetamine lab); *United States v. Dishman*, 377 F.3d 809, 810 (8th Cir. 2004) (identifying cans of Coleman fuel and anhydrous ammonia as precursor products to the manufacture of methamphetamine); *Kleinholz v. United States*, 339 F.3d 674, 677 (8th Cir. 2003) (associating the intense smell of ether with an active methamphetamine lab); *United States v. Francis*, 327 F.3d 729, 732 n.7 (8th Cir. 2003) (noting that items seized in clean up of methamphetamine lab "included coffee filters stained with red phosphorous, juice jars with coffee filters, a 1,000 ml Pyrex flask, a bottle of hydrochloric acid, another 1,000 ml flask half full with a liquid, a bottle of Vitablend, a triple-neck Pyrex beaker containing actively-reacting liquids, a large plastic baggie that contained coffee filters with red stains, miscellaneous tubing

and hoses, a bottle of PH paper, empty Mason jars, muriatic acid, laboratory funnels, multiple 500 ml Pyrex flasks, miscellaneous funnels, Pyrex measuring material, acetone, and other chemical containers"); *Walsh*, 299 F.3d at 734 ("Here, the strong smell of ether and the equipment and residue found in the carport suggested ongoing [methamphetamine] manufacture in the shed."). In this case, there was no suggestion that anything in the trash pointed to an active methamphetamine lab in the Dorans' home, that odors that typically emanate from active labs were evident, or that officers observed any of the attributes of a methamphetamine lab during their investigation.

In footnote 4 of its opinion, the majority cites a number of cases for the proposition that the suspicion of "harboring a clandestine methamphetamine lab . . . has justified no-knock entries." *Ante* at 12. A careful review of these cases makes clear that each of them involved the *reasonable* suspicion of an active methamphetamine lab. For instance, in *United States v. Tucker*, 313 F.3d 1259 (10th Cir. 2002), whether the officers properly entered without first knocking was not even an issue on appeal; the case involved a night-time search. Even so, the night-time search was permitted because officers had a reasonable suspicion, based on information including direct observations of the defendant's recent purchases of methamphetamine precursors, that the defendant might be starting a methamphetamine cook. *Id.* at 1261, 1265-66. In *United States v. Spinelli*, 848 F.3d 26, 29-30 (2d Cir. 1988), the defendant had a prior conviction for methamphetamine production, possessed a handgun during a prior arrest, and had a reputation for violence. Furthermore, "agents had observed activity . . . during the previous few days that indicated that the manufacture of methamphetamine was ongoing." *Id.* at 29. The two cases cited from our circuit, *United States v. Keene*, 915 F.2d 1164 (8th Cir. 1990), and *United States v. Walsh*, 299 F.3d 729 (8th Cir. 2002), are equally inapplicable. *Keene* involved direct observations of an active methamphetamine lab

in the defendant's basement. *Keene*, 915 F.3d at 1166-67. In *Walsh*, the information gleaned immediately prior to the execution of the warrant, such as "the strong smell of ether and the equipment and residue found in the carport area suggested ongoing [methamphetamine] manufacture in the shed." *Walsh*, 299 F.3d at 734. These cases involved a reasonable suspicion of an active methamphetamine lab based on reliable information. The same cannot be said for Doran's case.

I also take issue with the majority's view that Greenwell and Grant cannot be liable for Doran's severe injuries, because their decision to effect a "dynamic entry" was based on information provided by Williamson. The majority cites *United States v. Hensley*, 469 U.S. 221 (1985), in support of this proposition, yet ignores *Hensley*'s caution that the officers' reliance on information provided by others must be *reasonable*, *id.* at 232-33. In *Hensley*, an officer from one jurisdiction performed an investigatory stop on the defendant based on a "wanted flyer" that had been issued by another jurisdiction. The question for review was "whether police officers could stop and briefly detain a person who is the subject of a 'wanted flyer' while they attempt to find out whether an arrest warrant has been issued." *Id.* at 223. The Court determined that the reasonableness of such police conduct depends on the extent of the officers' knowledge: "It is the objective reading of the flyer or bulletin that determines whether other police officers can defensibly act in reliance on it." *Id.* at 232-33.[9]

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[9] *Baker v. McCollan*, 443 U.S. 137 (1979), is also cited by the majority for the proposition that Greenwell and Grant did not need to perform further investigation. This case is wholly inapposite. *Baker* involved a person who was wrongly arrested on an outstanding warrant due to mistaken identity, and the Court held that there was no due process violation arising from officers' arrest and three-day detention of the plaintiff. There was no question, though, that the warrant itself was valid and appeared to confer the power to arrest the wrongly detained individual, and that the plaintiff matched the name and description of the sought-after fugitive (who was his

Applying *Hensley*, it is obvious that Greenwell's and Grant's reliance on the information provided to them by Williamson prior to the search could not possibly insulate them from liability. The analogue for *Hensley*'s "wanted flyer" in this case is the search warrant and affidavit, and a briefing by Williamson. From this information, Greenwell and Grant knew the "facts" were largely uncorroborated and unreliable allegations from an anonymous informant, and did not answer the question of whether genuine exigencies permitted Greenwell and Grant to do away with the knock-and-announce rule. Moreover, Greenwell and Grant knew they did not have a magistrate's permission to perform a no-knock search. No objective officer could have believed that, based on this information, a no-knock search was permissible.

The Supreme Court has consistently emphasized the importance of an officer's duty to knock and announce his presence before forcing entry into a person's home. In *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995), the Court held that the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[10] It noted that an unannounced entry may be permissible if the government could show that there was a threat of violence or a risk that evidence would likely be destroyed if officers

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brother). In contrast, Greenwell and Grant should have known from reviewing the warrant and supporting documents that there was not sufficient information to support a no-knock entry without further corroborative investigation.

[10] It is because of *Wilson* that I find unpersuasive the majority's citation to *Dalia v. United States*, 441 U.S. 238 (1979), in support of its contention that the execution of a warrant is best left to an officer's judgment. When *Dalia* was decided, Wilson had not explicitly included the knock-and-announce principle as part of the Fourth Amendment reasonableness inquiry. Thus, *Dalia* stands for nothing more than the rule that officers have discretion to conduct searches within the bounds of the Constitution, which did not happen in this case.

complied with the knock-and-announce rule. *Id.* at 935-36. Neither showing was made here.

The knock-and-announce principles were revisited in *Richards v. Wisconsin*, 520 U.S. 385 (1997), where the Court was faced with Wisconsin's rule that officers are never required to knock and announce in felony drug investigations."[11] Justice Stevens, writing for a unanimous court, recognized that felony drug investigations frequently involve the threat of violence and the possibility that evidence may be destroyed. *Id.* at 392 & n.2. Nonetheless, he concluded that blanket exceptions to the traditional knock-and-announce requirement could not be tolerated under the Fourth Amendment:

> First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten

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[11] The majority notes that the *Richards* Court upheld the no-knock search, even though the officers had asked for and been denied a no-knock warrant. While it is not clear why the magistrate initially denied the no-knock warrant application, it is clear from *Richards* why the Court approved the no-knock execution: when officers were executing the warrant, the suspected drug dealer slammed his motel room door in the officers' faces. *See Richards*, 520 U.S. at 396 (stating that "the petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs [] justified the officers' ultimate decision to enter without first announcing their presence and authority"). I have found no authority for the majority's proposition that an officer can conduct a no-knock search without a magistrate's approval based on information acquired prior to seeking the warrant. Despite the majority's insinuation to the contrary, *Richards* certainly does not stand for, or even support, this theory.

officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of the court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Id. at 393-94 (footnote omitted).[12]

The majority clearly ignores the admonition in *Richards* to determine whether the facts and circumstances *in this case* justified excused compliance with the knock-and-announce rule. *Id.* It rather takes the position that a "dynamic entry" was permitted because of an anonymous tipster's allegations that methamphetamine manufacture and sales were occurring at the Doran residence, and that the Dorans' son had recently been arrested for possessing a prohibited weapon. In doing so, the majority has disregarded *Richards*, and, in effect, has created a "blanket exception" to the knock-and-announce requirement. Judge Arnold put it well in his opinion for the original panel:

> Officer Grant testified that exigent circumstances existed because (a) there was a "safety, factor" involved in raiding drug houses, (b) there were violent, armed people in drug houses, and (c) he assumed the existence of lethal fumes from the chemicals used to produce methamphetamine. While not directly stated, the implication behind his testimony is that the police feared for their safety because the Doran house was presumed to be a methamphetamine lab. This reasoning, if allowed, would lead to a *per se* exception to the knock-and-announce rule for methamphetamine labs. The

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[12] Since *Richards*, the Supreme Court has reaffirmed the knock-and-announce rule in *United States v. Ramirez*, 523 U.S 65 (1998), and *United States v. Banks*, 540 U.S. 31 (2003). *Ramirez* involved a no-knock search that was conducted, pursuant to a no-knock search warrant, after police received information about an escapee from a confidential, reliable informant. *Ramirez*, 523 U.S. at 68-69. *Banks* did not involve a no-knock search at all; the issue was whether a fifteen-to-twenty-second pause between an announcement and forced entry was permitted during a daytime warrant execution in a drug investigation. *Banks*, 540 U.S. at 33-34. Neither case speaks to an officer's (as opposed to a magistrate's) decision to conduct a nighttime, no-knock execution of a warrant based on anonymous and largely uncorroborated information.

> Supreme Court has warned against such a result. The Fourth Amendment preserves the right of privacy one has in one's home. To overcome that privacy exception, the police interest should be specific to the individual and the place, not generalized to a class of crime.

Doran, 362 F.3d at 1052 (citation and quotation omitted).

In addition to being inconsistent with the Supreme Court's Fourth Amendment jurisprudence, the case before us is indistinguishable from *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994). *Lucht* involved a large-scale drug conspiracy. One defendant, Kress, appealed the denial of his motion to suppress evidence seized during a search of his home. He argued that the executing officers acted improperly by not first knocking and announcing their presence before forcing entry. Prior to the search, Robert Frock, who was in charge of executing the search, was advised that the search was for a large amount of methamphetamine, and that "there was a likelihood weapons would be present." *Id.* at 550. Frock was aware that Kress was a member of a motorcycle gang, and suspected "that Kress had anti-police sentiments." *Id.* Frock supposed that the search would be dangerous because his team, the Emergency Response Unit (ERU), was being used. *Id.* Based on these facts, the government argued its agents were confronted with an exigency that relieved them of the requirement to knock and announce their presence before forcing their way into Kress's home. Our court disagreed:

> We appreciate the fact that Frock assumed this was a high risk situation because ERU was employed. However, a decision to force entry cannot rest on an assumption. It requires consideration of the particular facts and circumstances surrounding the execution of the warrant. Here, ERU was not in a dangerous tactical situation. They did not hear or

> see anything to indicate they were in danger or that evidence was being destroyed. Frock knew that there was a likelihood that there were weapons in the house, but he had no information indicating that Kress was considered dangerous or violent or might be inclined to use the weapons against them. *See United States v. Marts*, 986 F.2d 1216, 1217-18 (8th Cir. 1993) (reasonable belief firearms may have been within residence, standing alone, clearly insufficient for exigent circumstances). Frock's belief that Kress had a propensity for anti-police sentiments was not based on any particularized knowledge. In fact, Kress's criminal record consisted of a nine-year-old misdemeanor drug possession conviction and a thirteen-year-old charge for carrying a concealed weapon for which prosecution was declined. Frock also knew that the search was for a large amount of methamphetamine, but he testified that this did not alter how he entered the house.

Id. at 551 (footnote omitted).

In *Lucht*, Kress was alleged to be dealing methamphetamine and carrying weapons, yet this did not justify ignoring the knock-and-announce rule. Similarly, Doran was anonymously alleged to be dealing drugs, having weapons, and his son supposedly had recently been arrested for possessing a sawed off shotgun. Of course, the en banc majority can overrule *Lucht*, but it does not so much as mention the case.

There is additional support for my view that the no-knock search was unreasonable. First, when officers went to the magistrate to obtain the warrant, they did not seek permission to perform a no-knock entry. I have found no authority for the proposition that an officer, armed with all the knowledge that he believes supports a no-knock entry prior to asking for a

warrant, may nonetheless usurp the role of the magistrate and decide on his own whether to knock and announce his presence. As a panel of our court has recently noted, "when the officers know, before searching, of circumstances that they believe justify a no-knock entry, it seems more consistent with the Fourth Amendment to ask a neutral judge for approval before intruding upon a citizen's privacy." *United States v. Scroggins*, 361 F.3d 1075, 1082 (8th Cir. 2004). Indeed, "[t]he showing the police must make to obtain a no-knock warrant is the same showing they must make to justify their own decision to dispense with the knock-and-announce requirement. *Only the timing differs.*" *Id.* (emphasis added). After today, not even the timing differs: Officers may seek a warrant but withhold a request for no-knock authorization, even when they later justify their no-knock intrusion entirely on information they knew before they sought the warrant.

As the district court noted, nothing changed from the time the officers sought the warrant and the time they executed the search. The police received the anonymous tip in this case on July 20, 1998. Without explanation, Williamson delayed his request for a warrant until August 6, 1998. Even after officers received the warrant, they did not perform the search until August 11, 1998. Certainly, there is questionable logic in appellants' assertion that they were concerned about an active methamphetamine lab and all of its attendant dangers when they took nearly a month to search for the lab.

In conclusion, I find no reasonableness in the "dynamic entry" into the Dorans' home in the dead of night. The executing officers knew that the purported exigency was based on stale, unvarying, and largely uncorroborated information, which turned out to be entirely untrue. Their suspicions were based upon inference built upon inference, with no true factual basis. Moreover, there was no information specific to the Doran home that permitted a no-knock entry. The officers' view that cases involving drugs and weapons should be

excepted from the knock-and-announce principle finds no support in the Constitution. Nonetheless, it has now been adopted by the majority in this case. This stands at odds with the Supreme Court's knock-and-announce jurisprudence, and leaves an innocent man with no redress for clearly unreasonable and unconstitutional governmental conduct. I cannot accept the fairness of such a result. I would respect the jury's verdict and affirm the district court.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

David Doran,

Appellee,

v.

Dennis Eckold, in his official capacity as President of the Board of Police Commissioners of Kansas City, Missouri; Eric Greenwell, in his official capacity as a police officer of the Kansas City, Missouri Police Department and in his individual capacity; Ty Grant, in his official capacity as a police officer of the Kansas City, Missouri Police Department and in his individual capacity,

Appellants,

No. 03-1810WM

OPINION

Appeal from the United States District Court
for the Western District of Missouri

Submitted: September 10, 2003
Filed: April 6, 2004

Before LOKEN, Chief Judge, HEANEY, and RICHARD S. ARNOLD, Circuit Judges.

OPINION

RICHARD S. ARNOLD, Circuit Judge.

At 10:00 p.m. on the evening of August 11, 1998, Kansas City police executed a warrant to search the home of David Doran for drugs and other contraband. Using a tactic called "dynamic entry," the officers announced their presence and purpose but entered the house without knocking and affording its occupants time to answer the door. Officer Ty Grant, serving as "ram officer," yelled "Police, search warrant," simultaneously hitting the front door with his ram, breaking in on the third hit. Officer Mark Sumpter as "point man" was the first officer to enter the house. Sumpter moved quickly through the living room, reached the kitchen doorway, and saw Doran running toward him pointing a handgun. Sumpter testified that he yelled "Police, search warrant, get down," and fired. Doran was shot twice, sustaining serious injuries.

Doran commenced this action under 42 U.S.C. § 1983, asserting Fourth Amendment damage claims against Officer Sumpter for use of excessive force, Officer Grant for illegal entry, Sergeant Eric Greenwell for failure to supervise Grant, and the Board of Police Commissioners of Kansas City for failure to train its officers regarding Fourth Amendment restrictions on no-knock entries and for deliberate indifference to a custom and practice of no-knock entries. Doran testified that he had been asleep when he heard the ramming. Thinking it was a break-in or a fight on his front porch, he grabbed a pistol from under his pillow, ran from his bedroom into the kitchen, saw laser lights and realized it was the police, and bent to set his gun on the floor when he was shot. Doran denied hearing an officer yell, "Police, search warrant, get down," before he was shot.

Officer Grant testified that Officer Greenwell had trained him always to ram the door at the same time as announcing a

police presence. Officer Grant had never been trained to knock, nor witnessed another officer knock and announce, before ramming the door. Tr. 241-50.

After a four-day trial, the jury found in favor of Officer Sumpter on the excessive-force claim. It returned a verdict in excess of two million dollars for Doran on the illegal-entry claim against Officer Grant, the failure-to-train claim against Sergeant Greenwell, and the claims against the Board, finding that Doran's injuries were the direct result of those Fourth Amendment violations. The District Court[1] held as a matter of law, before the case went to the jury, that the facts known to the police were not sufficient to support a reasonable belief that exigent circumstances justified the no-knock entry. Judgment was entered on this verdict. The Board, Grant, and Greenwell appeal. We affirm.

I.

Kansas City narcotics detective Wesley Williamson obtained the warrant to search Doran's home on August 6, 1998. Williamson did not participate in the execution of the search warrant and did not testify at trial. The warrant and warrant affidavit were not offered into evidence and are not part of the record on appeal. The parties agree that the warrant affidavit was based on an anonymous tip, and that the warrant did not authorize a no-knock entry. Except for running a test on trash found near the Doran home and doing a spot check of the residence, no other corroborating investigation was done.

The task of executing the warrant was assigned to the Police Department's Street Narcotics Unit, a specialized unit whose primary function is to execute search warrants, usually on drug houses. Sergeant Greenwell was in charge of the Unit's entry team. Before executing the warrant, Greenwell

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[1] The Hon. Nanette Laughry, United States District Judge for the Western District of Missouri.

talked with the investigating officer and reviewed the warrant and warrant affidavit. He was told of an anonymous tipster's accusations that methamphetamine was being manufactured at the Doran home; that the Dorans were selling crack cocaine and methamphetamine at the front door; that drugs were stored in dresser drawers throughout the house; that guns were kept in the bedroom; and that Doran's 26-year-old son Joseph lived in the house and had recently been arrested for possessing a sawed-off shotgun. Sergeant Greenwell also did a drive-by to verify the location of the house and to "determine any tactical concerns," but did no other corroborating investigation.

On the basis of this information, alleged by the informant but not well corroborated, and his experience with methamphetamine labs, Sergeant Greenwell concluded that this would be a high-risk entry and instructed his team to enter without knocking. On the evening of August 11, the entry team gathered at an assembly point a few blocks from the Doran home. Because of the hazards associated with methamphetamine labs, Greenwell arranged for a fire department pumper and an ambulance to wait at the assembly point, and members of the entry team other than Officer Grant wore respirators to reduce the risk from chemical fumes. After Sergeant Greenwell briefed the entry team, the team proceeded to Doran's house and executed the warrant. Doran was shot soon after Officer Sumpter entered the house. The police completed the search after tending to Doran, finding one ounce of marijuana but neither a methamphetamine lab nor other illegal drugs. Doran had no prior criminal convictions and was not charged with an offense as a result of the search. This lawsuit followed.

II.

The defendants argue that because the jury found that Officer Sumpter's use of force was reasonable, no proximate cause could exist against the other officers and the Board on

the illegal-entry and failure-to-train claims. They argue that an act found reasonable by the jury starts anew the chain of causation. We disagree.

Both parties agree that a suit brought under 42 U.S.C. § 1983 sounds in tort. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999). Issues of causation in § 1983 suits are decided by looking to the common law. *See e.g., Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994). The issue presented by the defendants is not foreign to our jurisprudence. In *Trudeau v. Wyrick*, 713 F.2d 1360 (8th Cir. 1983), a state prison warden was sued for violating an outside minister's First Amendment rights. The minister, a gay man, had sent an inmate a response to a personal ad and a three-dollar check. *Id.* at 1362. The warden, thinking the inmate was attempting to exploit the minister, turned the letter over to the prison chaplain to "handle it." *Id.* at 1363. The chaplain reported the incident to the monsignor who, upon discovering that the minister was gay, took an adverse employment action against him. *Ibid.* The minister then brought suit against the warden and won. On appeal, the warden claimed that the act taken by the prison chaplain broke the chain of causation, relieving him of any tort liability under § 1983. *Id.* at 1366. We did not accept the argument then, and we do not accept it now. Foreseeable intervening acts, be they lawful or unlawful, do not break the chain of causation.

"The question of proximate cause is . . . normally one for the jury." *Ibid.* The defendants had every opportunity to argue this issue in closing. The jury found a link between the defendants' actions and Mr. Doran's injury, and we see no reason to dispute that factual finding.

Further, we question the logic of the defendants' argument. The jury was asked whether it was reasonable for Officer Sumpter, given the circumstances he faced once inside the home, to shoot Mr. Doran. Our review of the Board's and

the two officers' conduct starts at a wholly different time. It begins with the custom of disregarding the knock-and-announce rule, and specifically the disregard of the rule in the search of the Doran home, and asks whether it was foreseeable that such disregard could result in injury to Mr. Doran. The reasonableness of Officer Sumpter's actions does not control that question.

III.

Next, the defendants argue that the District Court erred when it ruled as a matter of law that no exigent circumstances existed. We disagree.

In *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Supreme Court held that "the police should be required to make [a showing of exigency] whenever the reasonableness of a no-knock entry is challenged." *Id.* at 394-95. The burden of proving exigency "is not high." *Id.* at 394. Even so, there is some flesh to the burden, and we do not think the police sufficiently demonstrated that exigent circumstances existed to justify their "dynamic entry" into the Doran home.[2]

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[2] The defendants alternatively argue that the District Court erred by not submitting factual questions to the jury before ruling on exigency. They cite *Tamez v. City of San Marcos*, 118 F.3d 1085, 1094 (5th Cir. 1997), for support. We have found no case in our Circuit which adopts the *Tamez* test, and we do not choose to do so now, because even if we adopted *Tamez*, we would affirm the District Court's ruling. The District Court held that there were no relevant factual matters in dispute, and the defendants did not request that special interrogatories be submitted to the jury. Further, on appeal, the defendants point to no specific fact that they allege was disputed. We agree with the District Court that there were no factual disputes for the jury to decide on the issue of exigent circumstances, and thus find the District Court's decision to move on to the legal question proper. The issue is not whether the police believed the information in the anonymous tip. The issue is whether it was reasonable for them to believe the information in the anonymous tip.

The knock-and-announce rule posits that, unless countervailing law-enforcement interests are sufficient, officers executing a search warrant at a person's home must knock and announce their presence before entering. *See Wilson v. Arkansas*, 514 U.S. 927,936 (1995), and *see also United States v. Mendoza*, 281 F.3d 712, 717 (8th Cir. 2002). The police can show a superseding interest by demonstrating a reasonable belief that the announcement would put them in danger, would be futile, or would inhibit effective investigation of the crime by allowing the destruction of evidence. *Richards*, 520 U.S. at 394. We look to the particular facts known to officers on the scene and circumstances surrounding the entry in judging whether dispensing with the knock-and-announce rule was justified. *See United States v. Cooper*, 168 F.3d 336, 339 (8th Cir. 1999). Thus, the burden is two-fold. The police must give a legitimate reason for doing away with the knock-and-announce rule, and there must be facts which make that concern reasonable. In the case at bar, both showings are weak.

We are not convinced that the police gave a legally sufficient reason for dispensing with the knock-and-announce rule. Officer Grant testified that exigent circumstances existed because (a) there was a "safety factor" involved in raiding drug houses, (b) there were violent, armed people in drug houses, and (c) he assumed the existence of lethal fumes from the chemicals used to produce methamphetamine. Tr. 260-61. While not directly stated, the implication behind his testimony is that the police feared for their safety because the Doran house was presumed to be a methamphetamine lab. This reasoning, if allowed, would lead to a *per se* exception to the knock-and-announce rule for methamphetamine labs. The Supreme Court has warned against such a result. *Richards*, 520 U.S. at 394 ("If a *per se* exception were allowed for each category of criminal investigation . . . the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."). The Fourth Amendment

preserves the right of privacy one has in one's home. To overcome that privacy expectation, the police interest should be specific to the individual and the place, not generalized to a class of crime.

This is not to say that the class of offense should have no bearing on our exigency analysis. As the Supreme Court recently noted, "[p]olice seeking a stolen piano may be able to spend more time to make sure they really need the battering ram." *United States v. Banks*, 540 U.S. ___, ___, 124 S. Ct. 521, 528 (2003). Thus, the type of crime should be considered in determining the existence of exigent circumstances, and undoubtedly methamphetamine-lab searches pose unique concerns of which we should be mindful. But in demonstrating a legitimate reason for disregarding the knock-and-announce rule, the police must provide an interest that is specific to the house they are searching, and the person who lives there – not rely on a per se presumption given the type of crime they are investigating.

Even had the police correctly framed their concern so as to state specific safety risks raised by the search of Mr. Doran's home, we are not convinced that concern was reasonable. The exigency exception to the knock-and-announce rule was meant, in part, to lessen the risks law enforcement face in dangerous situations. *See Wilson*, 514 U.S. at 936. It was not, however, meant to relieve officers of their obligations, in appropriate cases, to investigate before acting.[3]

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[3] Although we have found no case directly dealing with the police obligation of investigation in exigency questions, precedent from an area of law with a similar burden of proof, *Terry*-stop disputes involving anonymous tips, strongly supports our position. For example, the Second Circuit has held that the information needed to give rise to reasonable suspicion for the police to do a *Terry* seizure of luggage must meet a high standard of reliability. *United States v. Walker*, 7 F.3d 26, 29 (2d Cir. 1993). In its words: "[r]easonable suspicion is dependent upon both the

Here, the police supported their safety concern by pointing to the following evidence: an anonymous, uncorroborated tip that the Dorans were buying and making methamphetamine; the uncorroborated statement that the younger Mr. Doran had been arrested for illegal firearm possession; the uncorroborated statement that there were guns in the house; and drug residue in a trash bag found outside the home. Thus, there was almost no certainty to most of the information the police reportedly "knew." Had the police done even some investigation or surveillance they would have had a better understanding of whether the Dorans posed a security risk justifying a no-knock entry. Instead, they relied on very sketchy information, a reliance we find unreasonable, and outweighed by the privacy interest the Fourth Amendment is meant to protect.

In reaching our conclusion, we are mindful of the terms of our test. We judge the reasonableness of an alleged exigency based on the "facts and circumstances known to the officers" at the time of the search. *Cooper*, 168 F.3d at 339.

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content of information possessed and its degree of reliability." *Ibid.* The Court reasoned that the disputed anonymous tip, standing alone, would generally not be reliable enough to justify a *Terry* stop because it lacked any indicia of reliability. *Id.* at 30. "However, because the police verified nearly every aspect of the tip, [the Court] conclude[d] that under the totality of the circumstances the police had reasonable suspicion. . . ." *Id.* at 31. Similarly, the *Supreme Court held in Alabama v. White*, 496 U.S. 325 (1990), that "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.* at 330. In *White*, the Court approved the disputed *Terry* stop because the police demonstrated significant corroboration of the anonymous tip. *Id.* at 331. In our case, the police did no corroborating investigation to show that the Dorans were either selling or making methamphetamine. While the defendants point to the trash test, such evidence, at best, points to use, and certainly does not demonstrate any of the potential concerns raised by an alleged meth lab, which might, if properly developed, justify disregarding the knock-and-announce rule.

Here, the police knew very few facts, and the circumstances were that they had done very little corroborating investigation. Given their failure to corroborate the anonymous tip, we hold that they did not know enough to demonstrate exigency. It was their burden to demonstrate sufficient facts to support a finding of exigent circumstances, and they failed to do so. It was entirely appropriate for the District Court to infer that no efforts at corroboration were made. The government had the burden of proof, and surely it would have shown corroboration if there had been any.

IV.

The defendants also argue that the District Court improperly admitted the testimony of expert witness Gerald Gottlieb, as it was unreliable or untrustworthy. We are not persuaded.

Mr. Gottlieb, a certified public accountant, was retained by Mr. Doran to testify on the amount of income Mr. Doran lost as a result of the shooting. To reach his conclusion, Mr. Gottlieb relied on Mr. Doran's own estimation of his reduction in work capacity and the clients he lost. Mr. Gottlieb then took Mr. Doran's pre-shooting tax returns and client invoices to estimate the dollar amount of loss. At trial, Mr. Gottlieb described his education and his roughly thirty years' experience as an accountant. He described what the plaintiffs requested him to do as "crunching numbers," and he expressly stated on direct examination that he had "no firsthand information as to what [Mr. Doran's] capacity was." Tr. 497, 501.

The defendants argue that because Mr. Gottlieb relied on Mr. Doran's "best guess" as to Mr. Doran's reduction in work capacity and not on a doctor's analysis that his testimony did not cross the threshold of reliability necessary for an expert witness. Framed as it is, the appeal questions the admissibility

of Mr. Gottlieb's testimony and not his qualifications as an expert. This distinction is important. "Once the trial court has determined that a witness is competent to testify as an expert, challenges to the expert's skill or knowledge go to the weight to be accorded to the expert testimony rather than to its admissibility." *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir. 1995) (citations omitted). Put another way, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988). Thus, "[o]nly if an expert's opinion is 'so fundamentally unsupported that it can offer no assistance to the jury' must such testimony be excluded." *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995).

We do not think that Mr. Gottlieb's testimony was unsupported. His mathematical calculations were derived using standard accounting procedures and based on Mr. Doran's estimation (not just a "guess"). To the extent that the jury did not believe Mr. Doran's estimation they could have reduced or eliminated their reliance on Mr. Gottlieb's testimony. But to the extent that they believed Mr. Doran's estimation, Mr. Gottlieb's testimony was certainly helpful to the jury, and it was proper for the District Court to admit it.

V.

Finally, the defendants argue that the District Court abused its discretion in denying their motion for a mistrial. Their argument on this point is two-fold. First, they argue that a mistrial should have been declared when Mr. Doran asked a witness whether he knew what "being sued in an official capacity" meant, and that his personal funds would not be used in paying any judgment rendered. The question, however, was never answered, as the defendants successfully objected.

Second, the defendants argue that a mistrial should have been granted when the District Court denied their attempt to show that any verdict would be paid from taxpayer funds. We disagree.

We review a denial of a motion for mistrial for abuse of discretion. *Sterkel v. Fruehauf Corp.*, 975 F.2d 528, 532 (8th Cir. 1992). We rarely overturn a lower court's ruling because the District Court "is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record." *Williams v. Mensey*, 785 F.2d 631, 637 (8th Cir. 1986). We follow that maxim here, as we find the District Court's ruling reasonable. Mr. Doran's question was never answered, and any prejudicial effect caused by the mere question was cured by the Judge's instruction to the jury that " [s]tatements, arguments, questions and comments by lawyers are not evidence." Appellant's App. at 57.

Affirmed.

LOKEN, Chief Judge, dissenting.

I respectfully dissent. My disagreement lies not with the court's articulation of Fourth Amendment principles in Part III of its opinion. Rather, I conclude on this record that the police officers sued for illegal entry, Sergeant Greenwell and Officer Grant, acted reasonably in concluding that exigent circumstances warranted *their* conduct in effecting the no-knock entry.

During the instructions conference at the close of the evidence, the district court "ruled as a matter of law that there were not exigent circumstances which permitted the waiver of the knock or wait rule, and we'll not be submitting that to the jury." As a result, the jury instructions on the Fourth Amendment claims against Sergeant Greenwell and Officer Grant

virtually directed a verdict in favor of Doran on those claims. Procedurally, this exigent circumstances ruling was flawed.

The district court explained its ruling in a post-verdict opinion denying defendants' post-trial motions. The court cited the following facts as supporting its conclusion that exigent circumstances did not justify the no-knock entry: the warrant affidavit was based upon an anonymous tip that did not come from a reliable confidential informant; the tip that drug sales were occurring at the Doran house was not corroborated by a controlled buy or surveillance; the trash search uncovered drug residue, but no evidence linked the trash to Doran's house; the police did not check the criminal history of Doran and his wife, which would have revealed no prior arrests; and the allegation that Doran's son was recently arrested for possession of a sawed-off shotgun was not verified. These facts concern what the narcotics investigators knew or should have known when the search warrant issued.

Kansas City narcotics detective Wesley Williamson obtained the warrant to search Doran's home. Detective Williamson did not testify at trial. The warrant and warrant affidavit were not offered into evidence and are not part of the record on appeal. The parties agree that the warrant affidavit was based on an anonymous tip and that the warrant did not authorize a no-knock entry. But the trial record is silent regarding the investigation that preceded issuance of the warrant. Thus, the above-summarized "facts" on which the district court relied were not established at trial. Indeed, at least one fact assertion is contrary to the discovery record, because Detective Williamson testified in a pretrial deposition that the trash search uncovered mail addressed to the Dorans at that address. While I agree that the ultimate issue of Fourth Amendment reasonableness is an issue of law, I conclude the court erred in failing to specify the record on which its ruling

was based and in relying on inferences drawn from pretrial proceedings rather than on the facts proved at trial.[4]

In addition, the district court's analysis of the exigent circumstances issue was contrary to the Supreme Court's knock-and-announce decisions in two important respects. First, the district court emphasized that the police did not obtain a no-knock warrant to search the Doran home. In *Richards v. Wisconsin*, the Supreme Court held that a case-by-case analysis of the facts of a particular entry is required to determine if the police had "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." 520 U.S. 385, 394 (1997). The Court noted that a no-knock warrant is reasonable if the issuing magistrate is presented with a sufficient showing of exigent circumstances. But it went on to hold that the no-knock entry in *Richards* was reasonable *even though the issuing magistrate had denied a request for a no-known warrant*. *Richards*, 520 U.S. at 395-96 & n.7; *accord United States v. Banks*, 124 S. Ct. 521, 525 (2003) ("[E]ven when executing a warrant [that does not authorize a no-knock entry], if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."). Thus, absent no-knock authority in the warrant, the question is whether the police had reasonable suspicion of exigent circumstances at the time they executed the warrant.

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[4] In determining "whether the Fourth Amendment has been violated by a failure to knock and announce, we must remember reasonableness is our polestar." *United States v. Mendoza*, 281 F.3d 712, 717 (8th Cir.), *cert. denied*, 537 U.S. 1004 (2002). We review this issue of law *de novo*. *See, e.g., United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir.) (en banc) (John R. Gibson, J., concurring) (stating the opinion of the court on this issue), *cert. denied*, 502 U.S. 985 (1991).

Second, the district court erred in emphasizing that the facts known to the police as they approached the Doran house were the same facts known when they applied for the warrant. To be sure, exigent circumstance cases often turn on facts that unfold as the police approach the premises to be searched, or after they initially knock. *See, e.g., Richards*, 520 U.S. at 388-89. But the Fourth Amendment analysis turns on the totality of the circumstances, including facts gathered by the police before they applied for the warrant. The district court's approach might well result in the police requesting no-knock authority whenever the facts recited in the warrant application might justify a no-knock entry. This would encourage excessive use of the no-knock tactic and is contrary to countless Supreme Court decisions applying the Fourth Amendment's reasonableness standard.

The court properly avoids the district court's errors of law in Part III of its opinion. But to compensate, the court errs by shifting the analysis from the conduct of the defendants, Sergeant Greenwell and Officer Grant, to the conduct of "the police." *See ante* at 7-10. Section 1983 liability is personal. It is based upon the conduct of a specific defendant acting under color of state law. Just as the sheriff sued for executing an arrest warrant on an innocent man was held not liable in *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979), because he was not "required by the Constitution to investigate independently every claim of innocence," so too a police officer sued for executing a search warrant improperly is not liable under § 1983 for inadequacies in the investigation that led to the warrant being issued, so long as the facts known to the defendant at the time he executed the warrant rendered *his* conduct constitutionally reasonable. Thus, in my view, this case should turn on whether the evidence established that Sergeant Greenwell and Officer Grant acted reasonably in using the no-knock method of executing the warrant to search Doran's house.

The task of executing the warrant was assigned to the Police Department's Street Narcotics Unit, a specialized unit whose primary function was to execute search warrants, usually on drug houses. Sergeant Greenwell was in charge of the Unit's entry team. Before executing the warrant, Sergeant Greenwell talked with Detective Williamson, the investigating officer, and reviewed the warrant and warrant affidavit. From this, he learned that methamphetamine was being manufactured at the house to be searched; that Doran was selling crack cocaine and methamphetamine at the front door throughout the day; that drugs were stored in dresser drawers throughout the house; that guns were kept in the bedroom; that Doran's 26-year-old son Joseph lived in the house and had recently been arrested for possessing a sawed-off shotgun; and that trash collected near the Doran home had tested positive for controlled substances. Sergeant Greenwell also did a drive-by to verify the location of the house and to "determine any tactical concerns." Based upon this information and his experience with methamphetamine labs, Sergeant Greenwell concluded that this would be a high-risk entry and instructed his team to make a dynamic entry. He selected Officer Grant to serve as ram officer for the entry. Because of the hazards associated with methamphetamine labs, Greenwell arranged for a fire department pumper and an ambulance to wait at the entry team's assembly point. Members of the team other than Officer Grant wore respirators to reduce the risk from chemical fumes. After a briefing by Sergeant Greenwell, the entry team proceeded to Doran's house and executed the warrant.

On this record I conclude that Sergeant Greenwell acted reasonably in deciding to execute the search warrant by means of a no-knock entry. From his investigation, Greenwell learned that the Doran house was suspected of harboring a clandestine methamphetamine lab. That fact has justified no-knock entries

in numerous cases.[5] Consistent with these cases, Sergeant Greenwell testified at trial:

> Q. What kind of dangers do you encounter in terms of officer safety when you enter . . . what you presume to be a meth lab?
> A. Well, besides the obvious danger of drugs and firearms . . . you have a lot of added problems that go along with a clandestine lab. . . . The chemicals and the types of products that individuals use to manufacture methamphetamine are very volatile, combustible, ha[ve] caused explosion, fire, things of that nature. We carry specific types of equipment to help make our entry safer for us . . . and we train the [officers] to evacuate if those detectors go off that tell us whether the environment is superseding our personal protective equipment.
>
> . . . .
>
> Q. . . . [H]ave you ever been in a lab where somebody tried to destroy it?
> A. Yes. We've been in a situation before where suspects could flee and knock over parts of the lab. . . . Sometimes they destroy the lab in an attempt to cause harm to us on the entry team and sometimes trying to destroy evidence. . . .
> Q. Okay. Is there any kind of gas danger?
> A. Gas, there's a phosphine gas danger . . . which is highly deadly.

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[5] *See United States v. Tucker*, 313 F.3d 1259,1265-66 (10th Cir. 2002); *United States v. Keene*, 915 F.2d 1164, 1168-69 (8th Cir. 1990), *cert. denied*, 498 U.S. 1102 (1991); *United States v. Spinelli*, 848 F.2d 26,29-30 (2d Cir. 1988); *cf. United States v. Walsh*, 299 F.3d 729, 733-34 (8th Cir.) (warrantless search authorized by public safety exigency), *cert. denied*, 537 U.S. 1066 (2002).

Greenwell also learned that ongoing drug sales had been reported and corroborated by a trash search, and that numerous weapons were thought to be kept in the house, facts that also have justified no-knock entries in numerous cases.[6] Finally, he learned that Doran's son was recently arrested for possession of a sawed-off shotgun. Reasonable suspicion that an armed and potentially dangerous resident will be present has frequently justified no-knock entries.[7] The entry team conducted no surveillance to determine if the son was home or any residents were awake immediately before the nighttime entry. But if facts known prior to obtaining the warrant justify a no-knock entry, and if no contrary facts are discernable to the officers when executing the warrant, then the no-knock entry is constitutionally reasonable.

While the police bear the burden of establishing exigent circumstances, in a felony drug investigation "[t]his showing is not high." *Richards*, 520 U.S. at 394. In this case, the head of a team brought in to execute the warrant learned that the house to be searched was suspected of harboring a clandestine methamphetamine lab, a stash of drugs for ongoing street sales, multiple weapons, and a potentially violent resident. It was constitutionally reasonable for Sergeant Greenwell, the head of this special team, to rely on what he learned from reading the warrant documents and from interviewing the investigating narcotics officer. In explaining its contrary ruling, the district

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[6] *See Banks*, 124 S. Ct. at 527; *United States v. Washington*, 340 F.3d 222, 227 (5th Cir.), *cert. denied*, 124 S. Ct. 942 (2003); *United States v. Gambrell*, 178 F.3d 927, 928-29 (7th Cir.), *cert. denied*, 528 U.S. 920 (1999); *United States v. Mattison*, 153 F.3d 406, 410-11 (7th Cir. 1998); *United States v. Singer*, 943 F.2d 758, 761-63 (7th Cir. 1991); *State v. Baker*, 103 S.W.3d 711, 717-19 (Mo. 2003) (en banc).

[7] *See United States v. Ramirez*, 523 U.S. 65, 68-72 (1998); *United States v. Nguyen*, 250 F.3d 643, 645 (8th Cir. 2001); *United States v. Gay*, 240 F.3d 1222, 1228-29 (10th Cir.), *cert. denied*, 533 U.S. 939 (2001); *United States v. Weeks*, 160 F.3d 1210,1213-14 (8th Cir. 1998); *United States v. Murphy*, 69 F.3d 237,243 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996).

court relied on the fact that Officer Grant "routinely operated the ram as he did in this case." But Sergeant Greenwell made the decision to make the no-knock entry and assigned Officer Grant the role of ram officer. Greenwell testified that Grant was often given this assignment for high-risk entries. Having been briefed by Sergeant Greenwell, Officer Grant had no constitutional duty to verify that exigent circumstances attended execution of the Doran warrant before carrying out his assignment. In these circumstances, Officer Grant's testimony did not establish a Fourth Amendment violation.

Although Sergeant Greenwell and Officer Grant acted reasonably, the no-knock entry might nonetheless have been constitutionally unreasonable if the information of suspected activity came from an unreliable source and was insufficiently corroborated by the narcotics investigators. But Doran did not sue the investigating officer, Detective Williamson. Instead, the district court found from "evidence" outside the trial record that the investigation was inadequate and then used that finding to impose substantial Fourth Amendment damage liability on police officers whose own conduct was constitutionally reasonable. This was an improper extension of § 1983 liability.

For the foregoing reasons, I conclude that the Fourth Amendment claims against Sergeant Greenwell and Officer Grant should not have been submitted to the jury. And because these individual defendants did not violate Doran's constitutional rights, his failure-to-train and custom and practice claims against the Board likewise should not have been submitted. *See Roach v. City of Fredericktown*, 882 F.2d 294, 298 (8th Cir. 1989). Accordingly, I would reverse the judgment of the district court and remand the case with directions to dismiss the complaint.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID DORAN, Plaintiff, v. DENNIS C. ECKOLD, *et al.*, Defendants,	Case No. 01-824-CV-W-NKL

ORDER

This case involves the search of Plaintiff David Doran's ("Doran") home by the Kansas City, Missouri Police Department. The search occurred after dark when Doran and his invalid wife were asleep. The police officers had a search warrant but failed to knock and wait before breaking down Doran's door. Doran woke abruptly and grabbed his licensed gun, thinking that someone was breaking into his house. As soon as Doran realized that the intruders were police officers, he bent over to put the gun down, but before the gun was on the floor he was shot three times by Officer Sumpter, the point officer who was first into the home.[1]

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[1] There was a factual dispute about whether Officer Sumpter identified himself as a police officer when he entered the Doran home. Sumpter's fellow police officers did not hear Sumpter identify himself as a police officer; neither did Doran. Sumpter testified that he did identify himself as a police officer. Immediately before the door was broken down, Grant, the

Doran sued the Defendants, claiming a violation of his constitutional right to be free from unreasonable search and seizure. The jury found in favor of Officer Sumpter but against the remaining Defendants, including the officer who broke into Doran's home without first knocking. (*See* Verdict B). The Defendants held liable are the Board of Police Commissioners of Kansas City, Missouri ("Board"), the officer who broke down Doran's door, Sergeant Ty Grant ("Grant"), and Grant's supervisor, Sergeant Eric Greenwell ("Greenwell"). Pending before the Court is Defendants' Motion to Alter or Amend Judgment or for a New Trial [Doc. # 137]. For the reasons stated below, Defendants' Motion to Alter or Amend Judgment or for a New Trial will be denied.

I. Legal Standard

In determining whether a judgment should be altered or amended, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The court must consider whether "sufficient evidence was produced to support a reasonable fording on each of the elements of the plaintiffs claim or claims." *Cross v. Cleaver*, 142 F.3d 1059, 1066 (8th Cir. 1998). The verdict may be set aside only when all the evidence points one way and is susceptible of no reasonable inference sustaining the jury's verdict. *Scott Fetzer Co. v. Williamson*, 101 F.3d 549, 553 (8th Cir. 1996).

A new trial is warranted when the initial trial results in a "miscarriage of justice." *Harris v. Secretary, U.S. Dep't of the Army*, 119 F.3d 1313, 1318 (8th Cir. 1997). Such a miscarriage of justice may be the result of "a verdict against the weight of the evidence, an excessive damage award, or legal errors at trial." *Gray v. Bickneli*, 86 F.3d 1472, 1480 (8th

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ram officer, did announce the presence of the police from the porch of Doran's home.

Cir. 1996). To determine if the new trial should be granted, "the trial court can rely on its own reading of the evidence – it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *Harris*, 119 F.3d at 1318 (quotation omitted). A new trial will not be granted, nor will a verdict be set aside, based on an incorrect evidentiary ruling absent a clear and prejudicial abuse of discretion. *Lovett v. Union Pacific R.R. Co.*, 201 F.3d 1074, 1081 (8th Cir. 2000). In order to grant a new trial based on trial court error, the Court must determine that the evidentiary or instructional ruling was so prejudicial that retrial would likely produce a different result. *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990).

II. Discussion

Defendants raise seventeen points in support of their Motion to Alter or Amend Judgment or for a New Trial. Based on the similarities among some points, the Court will consider them in groups as five separate arguments.

A. Points 1-9: Knock and Announce and Exigent Circumstances

Defendants argue that the Court erred as a matter of law when it found that there were no exigent circumstances sufficient to justify the suspension of the knock and announce rule. Alternatively, the Defendants contend that the jury, not the Court, should have decided this issue. Finally, Defendants contend that the Court erred when it refused to allow Exhibit P8 to be introduced into evidence. Exhibit P8 was the police record of the anonymous tip which the police relied on to obtain the warrant for Doran's residence.

"In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective

investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). No blanket exception to the knock and announce requirement exists for felony drug investigations. *Id.* at 389. The determination of whether the established facts created exigent circumstances sufficient to justify waiver of the knock and announce requirement is one of law for the Court. This determination has two parts:

> First, as a factual matter, the jury (or judge in a bench trial) must sit as a finder of fact, deciding which facts (alleged to form the basis for the claim of exigency) are established by the evidence. . . . Second, the court must decide, as a matter of law, whether the facts that have been established, as a matter of law, create exigent circumstances sufficient to justify a warrantless search.

Tamez v. City of San Marcos, Texas, 118 F.3d 1085, 1094 (5th Cir.1997) (internal citations omitted).

Here, the facts concerning the claim of exigency were not in dispute. The officers in question did not have a no knock warrant. The facts known to them as they approached the house were the same facts known to them at the time they applied for a search warrant. These facts were that an anonymous tipster stated that crack cocaine and methamphetamine were being sold from the front door of the home at 612 West 101st Street, Kansas City, Missouri, and that home was occupied by David Doran. The drugs were "throughout the residence." The anonymous tip went on to say that there were guns in the master bedroom closet and under the bed and Doran and his wife were manufacturing crystal meth. The officers also knew that some plastic taken from a trash bag in front of the Doran house had drug residue on it. Other than its location, however, there was no evidence that the drug residue or the trash bag in which it was found was linked

to the Doran residence. The trash bags found in front of the Doran residence contained no evidence of any of the chemicals or apparatus used to make methamphetamine. There was an allegation in the tip that Doran's son had recently been arrested for possession of a sawed off shotgun, but that allegation was not verified before the search and Defendants presented no evidence that such an arrest had occurred. Plaintiffs denied that such an arrest had occurred.[2]

These facts were all known to the Defendants at the time a search warrant was requested, yet they did not ask for no-knock authority. They did not conduct a surveillance before the search to determine if the son or anyone else was home. They executed the search warrant at night and there is no evidence that they saw lights in the house indicating that anyone was at home. They took no steps to conduct a controlled buy to verify that the allegations contained in the anonymous tip were reliable. They conducted no surveillance to determine if hand-to-hand sales of drugs were occurring at the front door of the residence. They did not conduct a criminal history check of the Dorans. If they had, they would have learned that neither Doran or his wife had ever been arrested.

Because these facts were not in dispute, the Court moved on to the second step in the *Tamez* formula to determine as a matter of law whether these established facts created exigent circumstances sufficient to justify no-knock entry.[3] Absent

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[2] The presence or absence of exigent circumstances must be judged based on the information and circumstances as they existed at the time the police searched Doran's house. Whether the arrest did or did not occur is not at issue. The Court has instead looked at what the police relied on and the reasonableness of that reliance given the source of the information and the efforts to confirm the information.

[3] Defendants argue that the Court erred by not allowing the jury to decide whether the knock and announce requirement was properly eliminated.

exigent circumstances, police officers executing a search warrant must knock and announce their identity and purpose before entering someone's home. *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997). The knock and announce rule "forms a part of the reasonableness inquiry under the Fourth Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995). The rule's purpose is to reduce the risk of violence to both police and the occupants of the suspect house, prevent needless destruction to property and protect an individual's right to privacy in their home. *United States v. Bates*, 84 F.3d 790, 794 (6th Cir. 1996).

To determine whether the police have complied with the knock and announce rule or to determine whether exigent circumstances exist, the Court must analyze the facts and circumstances on a case by case basis. *Richards v. Wisconsin*, 520 U.S. at 394; *see also United States v. Murphy*, 69 F.3d 237 (8th Cir. 1995). As previously indicated, there is no blanket exception for felony drug investigations.

> [W]hile drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being

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However, it is clear that this issue is a question of law. *United States v. Moore*, 956 F.2d 843, 855 (8th Cir. 1992); *Tamez v. City of San Marcos, Texas*, 118 F.3d at 1094; *United States v. Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992); *United States v. Howard*, 961 F.2d 1265, 1267 (7th Cir. 1992). Had there been a factual dispute about the circumstances known to the police at the time they approached the Doran house, it could have been submitted to the jury for resolution. The relevant underlying facts, however, were not in dispute.

> searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry.

Richards v. Wisconsin, 520 U.S. 385, 393 (1997). Thus, the police must have "a reasonable suspicion that knocking and announcing their presence under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. at 394.

Considering the unique facts of this case, the Court concluded that exigent circumstances did not justify suspending the knock and announce rule. The primary source of the Defendants' information was an anonymous tip. The information did not come from a reliable confidential informant. The information could have been easily verified because the sales were supposedly being made at the front door of the house. Yet, the Defendants' only effort to verify the information was to see if Doran lived at the house and to conduct a trash search. No surveillance was done. No effort was made to conduct a controlled buy. The trash run revealed drug residue, but the Defendants, with at least the burden of production on this issue, did not show that the sack containing the drug residue had anything in it which connected it to the Doran house. The anonymous tip referred to Doran's son's recent arrest for possessing a sawed off shot gun, but the allegation was not checked and there was no attempt made by the police officers to determine if the son, or anyone else, was at home.[4] All this information was known to the officers at the

[4] Doran contends that no such arrest had occurred and Defendants presented no evidence that such an arrest did occur.

time they applied for a search warrant, but they never requested a judicial officer to issue a no-knock warrant. Had they believed the facts justified a no-knock entry, one would expect them to run it by a judicial officer to protect themselves and to ensure a conviction if criminal activity were discovered. No such request was made.

This record also makes it clear that Defendant Grant routinely operated the ram as he did in this case – no knock and no wait – just hit the door immediately or simultaneously with his announcement. The suspected presence of a methamphetamine lab and weapons made no difference in this particular entry. Finally, the search was done at night and there was no activity observed as the police officers approached. What may be reasonable during the day is not at night when people are asleep and would necessarily be slower to respond or destroy property. *See United States v. Gallegos*, 314 F.3d 456, 461 (10th Cir. 2002).

Even if the officers subjectively believed that the no-knock entry was appropriate, that belief was not objectively reasonable under the particular circumstances of this case. *See United States v. Spinelli*, 848 F.2d 26, 29-30 (2d Cir. 1988). The cases cited by Defendants in support of their Motion to Alter or Amend Judgment or for a New Trial differ from the case at hand in that the defendants in those cases had previous convictions for violent crimes, or the officers had a tip from a reliable confidential informant and conducted an investigation or surveillance to confirm the information in the tip, or the officers actually did knock and announce and wait for a period of time before forcibly entering the home, or the defendants became aware of the officers' presence and attempted to flee. *See Richards*, 520 U.S. at 388; *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *United States v. Goodson*, 165 F.3d 610, 612 (8th Cir. 1999); *United States v. Lucht*, 18 F.3d 541, 549-51 (8th Cir. 1994); *Spinelli*, 848 F.2d at 29-30; *United States v. Mack*, 117 F. Supp. 2d 935, 942 (W.D. Mo. 2000).

None of these factors were present here. Furthermore, in *United States v. Lucht*, the Eighth Circuit found that exigent circumstances did not justify suspension of the no-knock requirement when defendant Kress' home was searched. While none of these no-knock cases ever involve identical facts, there are sufficient similarities between the Doran search and the Kress search to convince this Court that it did not err when it found exigent circumstances lacking.[5] The jury's verdict will be upheld.

B. Point 10: Court's Refusal to Allow Jury to View Exhibit P64

Defendants next argue that the Court erred when it did not allow the jury to view Exhibit P64 during their deliberations, even though the exhibit was requested by the jury. Exhibit P64 is the Kansas City Police Department's Legal Bulletin No. 95-5 and contains a detailed legal analysis of the Fourth Amendment and the common law knock and announce requirement. It was prepared by Defendants' lawyer in his role as Legal Advisor to the Kansas City Police Department. Defendants assert that Doran was allowed to selectively publish the exhibit to the jury by making reference to it through witnesses and having witnesses read portions of the exhibit to the jury. Under these circumstances, Defendants contend that the Court abused its discretion when it did not allow the entire exhibit to be considered by the jury.

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[5] Defendants have also argued that the Court erred by refusing to admit Exhibit P8, the record of the anonymous tip. While the Court did not admit this exhibit, it did consider the evidence in that exhibit to determine whether exigent circumstances existed. The jury was also aware of all the information in Exhibit P8, except for the reference to the sawed off shotgun. While Defendants now complain about Exhibit P8, they did not offer the exhibit during trial. The issue was complicated by the fact that Defendants didn't want Doran to be able to attack the sufficiency of the warrant.

Like Doran, however, Defendants were allowed to make reference to Exhibit P64 through witnesses and to have witnesses read to the jury those portions of the exhibit that Defendant wanted published. (Trial Tr. at 616-19). The Court, in fact, admitted the exhibit at Defendants' request. (Trial Tr. at 619). The Court did not prevent either party from using the exhibit during trial or closing argument. Nonetheless, the Court refused to send the exhibit to the jury because Exhibit P64 referred to "exigent circumstances" and the Court had determined by that time that the issue of exigent circumstances was for the Court and not the jury. The risk of confusing the jury on this issue was exacerbated because of statements made by defense counsel during closing argument. Shortly after encouraging the jury to request Exhibit P64, defense counsel made reference to exigent circumstances even though the Court had already ruled on the issue. (Trial Tr. 732).

Once an exhibit is properly admitted it is within the sound discretion of the trial court to determine whether the exhibit should be sent to the jury. That discretion will be overturned only for a clear abuse of discretion. *United States v. Foster*, 815 F.2d 1200, 1203 (8th Cir. 1987); *United States v. Gleason*, 726 F.2d 385, 388 (8th Cir. 1984). "[I]t is the district court's duty to instruct the jury on the law applicable to the case, and not the jury's duty to interpret the law." *Gleason*, 726 F.2d at 388. "[I]t would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be." *Id.* (quotation omitted). Because the possibility existed that the legal analysis and discussion in the legal bulletin might have confused the jury or might have led the jury to ignore the law in the Court's jury instructions and undertake its own legal analysis, the Court did not err in refusing to send Exhibit P64 to the jury. The Court will not grant a new trial on this basis.

C. Points 11-12: Testimony Concerning Payment of Any Judgment

During trial, Defendants tried to solicit evidence that any judgment against the Defendants would ultimately be paid by the taxpayers. The Court sustained Doran's objection to this evidence. During Doran's direct examination of Karl Zobrist ("Zobrist"), a police commissioner, Doran's counsel asked the following question: "You understand that we're not here asking for any of your personal money." (Trial Tr. 522). This question came after Doran's counsel asked Zobrist whether the Board of Police Commissioners is sued by naming each individual commissioner in their official capacity rather than suing the Board directly as an entity. Defendants' counsel objected to the question concerning Zobrist's personal money and the objection was sustained.[6] Defendants now claim that the Court erred by denying their request for a mistrial and erred by refusing to admit evidence that taxpayers would pay the judgment against Defendants. Claiming that they were prejudiced by these rulings, the Defendants request the Court to set aside Verdict B or, in the alternative, order a new trial.

The general rule in state and federal courts is that interjection of the fact that the defendant is protected by insurance or other indemnity may be prejudicial error requiring reversal. *Griffin v. Hilke*, 804 F.2d 1052, 1057 (8th Cir. 1986). The reasoning behind this rule with regard to testimony or argument concerning the defendant's indemnity protection is that it will result in an unduly generous award of damages by the jury. *Id.* Defendants equate the questioning of Zobrist to asking him about indemnity for any judgment entered against him. However, *Griffin* does not address the scenario wherein the defendant was sued in his official capacity only. The

[6] Defendants are incorrect when they state on page 6 of their Motion for a New Trial that "Doran was permitted to question Defendant Karl Zobrist on whether payment of any verdict would come from personal funds." The Court sustained Defendants' objection to this question.

Eighth Circuit has long acknowledged that, in order to sue the Board of Police Commissioners of Kansas City, Missouri, each individual board member must be sued in his or her official capacity. *Spencer v. Knapheide Truck Equip. Co.*, 183 F.3d 902, 905 (8th Cir. 1999). By doing so, however, a plaintiff does "not seek to hold the respondents individually liable, but rather used the only available method to properly bring the Board, as an entity, before the court." *Fantasma v. Kansas City, Mo. Bd. of Police Comm'rs.*, 913 S.W.2d 388, 390 (Mo. Ct. App. 1996).

Here, the Board of Police Commissioners is required by law to pay for the judgments entered against its members in their official capacities. The question therefore was arguably proper to clarify that a judgment against Zobrist was in fact a judgment against the Board rather than Zobrist individually. However, an even more important distinction between this case and *Griffin* is the fact that Zobrist never answered the question. Defendants' objection was sustained. While Defendants asked for a mistrial, Defendants did not identify the prejudice suffered. The unlikelihood of prejudice from this single question is evidenced by Defendants' failure to even ask the Court to instruct the jury to disregard the last question. Furthermore, any potential prejudice the Defendants sustained by this single question being asked did not justify starting a trial over, or result in a substantial injustice warranting a new trial.[7]

As to Defendants' request to introduce evidence that taxpayers would pay the judgment, the Court excluded this

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[7] In their Motion for New Trial, Defendants have not even sought to reduce the size of the judgment as overly generous. Yet the reason that a party is not permitted to ask about insurance or other indemnity funds is to prevent unduly generous damage awards. While Defendants state in their reply brief that they believe the judgment is overly generous, they have not sought remittitur or any other remedy. Defendants' actions are not consistent with a claim of prejudice.

evidence just as it excluded the allegedly improper question to Zobrist. While both parties tried, directly and obliquely, neither party was permitted to inquire about the source of funds that would pay a judgment.

D. Points 13-14: Expert Witness Jerrold L. Gottlieb

Defendants contend that the Court erred in allowing the expert testimony of Jerrold L. Gottlieb ("Gottlieb") because Gottlieb did not properly qualify as an expert witness and his testimony did not meet the requirements of Rule 702 of the Federal Rules of Evidence. Rule 702 lists three requirements an expert witness must meet. First, evidence based on scientific, technical or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance the finder of fact requires. *Lauzon v. Senco Products, Inc.*, 270 F. 3d 681, 686 (8th Cir. 2001); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-91 (1993).

Gottlieb, a certified public accountant, testified about Doran's loss of income and loss of overall net worth as a result of the injuries he sustained during the execution of the search warrant at his home. Defendants assert that the information Doran gave Gottlieb upon which Gottlieb based his opinions was "a guess" on the part of Doran, which does not qualify as scientific evidence that could be used as a basis for an opinion of loss of income or loss of net worth. Further, Defendants argued in their Motion to Exclude Expert Witness that Gottlieb was not qualified to testify as an expert because he has had no formal education in determining loss of income or loss of net worth and has only testified in two cases of this nature since 1994.

However, Gottlieb is a certified public accountant, and for his testimony in this case, he was supplied with Doran's income before he was injured, his days of total disability, the period during which Doran could work at 50% capacity, and the period of time Doran has been able to work at 80% capacity. In addition, he was provided with information concerning income and profits from a contract with Xtra Intermodal Company. Gottlieb performed mathematical calculations and applied accounting principles to this information, which assisted the jury in assessing Doran's lost income or net worth. Although the 50% and 80% estimates of Doran's work capacity were provided to Gottlieb by Doran as a "guess," an expert may base his opinions on facts perceived by him or made known to him. *See* Fed. R. Evid. 703. Further, Doran testified at trial to the information provided to Gottlieb, and the jury was free to determine the credibility of Doran's information. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1188 (2nd Cir.), *cert. denied*, 506 U.S. 826 (1992) (contentions that assumptions of an expert are unfounded "go to the weight, not the admissibility, of the testimony"). Because Gottlieb did qualify as an expert witness under the Federal Rules of Evidence, and Defendants' objections to his testimony go to the weight and credibility of Gottlieb's testimony rather than to its admissibility, Defendant's request for a new trial will be denied.

E. Points 15-17: Proximate Cause and Knock and Announce

The final argument raised by Defendants involves the issue of causation. Defendants contend that because the jury found that the force used by Defendant Sumpter was not excessive in Instruction Number 15, the jury could not find that Doran was damaged as a direct result of the actions of Grant, even assuming that Grant's actions amounted to a constitutional violation. In short, Defendants argue that there was no proximate cause between the unconstitutional entry and the

shooting injuries received by Doran because the jury found that the shooting itself was a reasonable use of force. *See Horn v. Madison County Fiscal Court*, 22 F.3d 653, 659 (6th Cir.), *cert. denied*, 513 U.S. 873 (1994). Defendants assert that because the jury found that Sumpter was justified in shooting Doran, Doran's actions were an intervening or superseding cause that broke the chain of events leading to his injuries. *See Bodine v. Warwick*, 72 F.3d 393, 40[illegible] (3rd Cir. 1995).

Defendants apply the same reasoning to the claims against Defendants Greenwell and Board, asserting that Doran cannot show that his shooting injuries were caused by Greenwell's failure to supervise Grant or an unconstitutional policy or custom of the Board. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). Defendants argue that if the unconstitutional entry into the home was not the proximate cause of Doran's shooting injuries, then the failure to supervise or the unconstitutional custom or practice allowing such entries cannot be the proximate cause of Doran's shooting injuries. Therefore, Defendants contend that the Court must set aside the $2,000,000.00 award for damages in Verdict B which were found by the jury to be a direct result of the gunshot wounds.

However, the jury was asked to determine whether all of the three elements listed in Instruction Number 15 were proved by the greater weight of the evidence. If the jury found, as it appears that they did, that Sumpter's use of force was reasonably necessary, they were instructed to enter a verdict for Defendant Sumpter. A verdict for Defendant Sumpter does not mean that the jury concluded that Doran was not damaged as a result of the shooting or that Doran was not shot as a result of the illegal entry. In fact, on Verdict B, the jury was asked whether they believed that "plaintiff's gunshot wounds were a direct result of either Defendants Grant, Greenwell, or Eckold, Daniels-Young, Zobrist, Perez, and Barnes' actions," and they answered in the affirmative.

Proximate cause is an issue to be resolved by the jury. *See Lone Star Industries, Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1462 (8th Cir. 1991). "[U]nder the Missouri law of proximate causation, to which [the court] may look in applying § 1983, it is enough that the defendant's fault was a `substantial factor' in producing the plaintiffs injuries, and the defendant's fault need not have been the sole proximate cause in order to allow recovery." *Trudeau v. Wyrick*, 713 F.2d 1360, 1367 (8th Cir. 1983). The relevant inquiry for determining causation is whether the injury would have been avoided had there not been in place the municipal custom at issue here. *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 779 (8th Cir. 1994); *City of Canton*, 489 U.S. at 391.

This is not a case where the Board is being held vicariously liable for injuries caused solely by its employees, rather, this is a case where the Board's custom and practice or failure to train was a substantial factor in producing Doran's injuries. *See Shrum v. Kluck*, 249 F.3d 773, 778 (8th Cir. 2001). The evidence strongly supports the jury's conclusion that Grant failed to knock and announce because that was the way he was trained and supervised, and that was the custom and practice of the Kansas City, Missouri Police Department. *See* Instructions No. 22, 25, and 28.[8] Further, the jury found that the Board was deliberately indifferent to the need for more or different training or the existence of the custom and practice. *See* Instructions No. 25 and 28. Because the jury found that the proximate cause of the shooting was the illegal entry, and the proximate cause of the illegal entry was an unconstitutional

[8] This appears to be a continuing practice. In *United States v. Workcuff*, Western District of Missouri, 02-00189-01-CR, a magistrate judge recommended that evidence seized in May 2002 by the Kansas City, Missouri Police Department be suppressed because a no-knock warrant had been issued by a Jackson County judge even though the affidavit used to obtain the warrant did not even contain information related to the exigency issue. The officers therefore could not rely in good faith on the warrant.

custom and practice of the Board or Greenwell's failure to supervise Grant, the jury's verdict will be upheld.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendants' Motion to Alter or Amend Judgment or for a New Trial [Doc. # 137] is DENIED.

/s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: March 6, 2003
Kansas City, Missouri

APPENDIX D

[PLAINTIFF'S EXHIBIT 8 – "DRAGNET" REPORT]

ACTIVITY ENTERED BETWEEN 07/10/99 AT 00:00 AND 07/24/98 AT 24:00

11.019646 AT 00612 W 101 ST APT. NO.: KANS CITY MO
UPDT: 07/23/98

CREATED BY: KCMOPD ON 07/23/98

CENSUS TRACT: 1001, BLOCK: 2080, BEAT: 533,
LEMRA: 916

KCMOPD CREATED THE FOLLOWING REPORTS:

REPORT NO.: 1 ENTERED 07/23/98 AT 18:4,
REPORTED 07/20/98 AT 18:24

SOURCE: TIPS ASSESSMENT: UNKNOWN

LOCATION DESCRIPTION: HOUSE COLOR: YELLOW
STATUS:

DRUGS: CRACK COCAINE METHAMPHETAMINE.

OTHER DRUG:
DRUG DEALING HOUR: ALL DAY

GUNS: YES REMARKS

DRUGS HIDDEN: YES REMARKS

SELLING TO: PERS KNOWN BLACKS WHITES

SELLING FROM: FRONT DOOR FACE/FACE

IDENTITY OF PERSONS INVOLVED:

NAME: DORAN DAVID MONIKER:
R: W S: M DOB: AGE: 50 PHONE:

STATUS: UNKNOWN

NAME: LINDA MONIKER:
R: W S: F DOB: AGE: 45 PHONE:
STATUS: UNKNOWN

NAME: DORAN JOSEPH MONIKER:
R: W S: M DOB: AGE: 26 PHONE:
STATUS: UNKNOWN

COMMENTS

SUSPECT #1 AND #2 ARE MAKING CRYSTAL METH AT THE RESIDENCE AND SELLING IT. THEY KEEP THE DRUGS IN VARIOUS DRESSER DRAWERS THROUGHOUT THE HOUSE. THE GUNS ARE KEPT IN THE MASTER BEDROOMS CLOSET AND UNDERNEATH THE BED. THE BEST WAY TO GET TO KNOW THE #1 AND #2 SUSPECTS IS TO MAKE FRIENDS WITH THE #3 SUSPECT, WHO IS THE SON. THE #3 SUSPECT HAD RECENTLY BEEN ARRESTED FOR HAVING A SAWED OFF SHOTGUN IN HIS POSSESSION.

ADDRESSES ENTERED; 11 REPORTS ENTERED: 11
REPORTS FOR ADDRESSES: 518

[Handwritten notes from here to end] 2-24-98

9 BEC MO 98 BLUE FORD TEMPO CLAWSON, LYRLE A.
9731 SYCAMORE 6-12-37

2 NNG MO BLUE MUSTANG DORAN LINDA 10-14-50
612 W 101 _____

414-FZH MO RED CHARGER DORAN, DAVID

410-GNK YELLOW TOYOTA DORAN, DAVID
845-HPJ BLUE LINCOLN WILKERSON, SHIRLEY S., W/F
3-28-60 SMITH SHIRLEY

No. 05-316

OCT 25 2005

In The
Supreme Court of the United States

DAVID DORAN,

Petitioner,

v.

DENNIS ECKOLD, in his official capacity as President of the Board of Police Commissioners of Kansas City, Missouri, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should adopt petitioner's proposed bright-line constitutional rule – one that, for qualified immunity reasons, will not be binding on any party to this case – that would require police in those states allowing "no-knock" search warrants to either obtain such a warrant in advance or else have their subsequent unannounced searches held to be per se unreasonable when no further exigent circumstances come to light after the warrant application, even where exigent circumstances would have initially supported a "no-knock" warrant.

2. In the context of a 42 U.S.C. § 1983 action seeking to impose personal liability on police officers and a Police Board for alleged constitutional violations, where qualified immunity thus applies if the claimed constitutional right was not "clearly established," whether police officers' reasonable beliefs that a house contains an operating methamphetamine laboratory, weapons stored throughout the house, and an individual recently arrested for possessing a sawed-off shotgun create sufficient safety concerns to allow them to execute a search warrant without knocking and announcing their presence.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Dennis Eckold, the remaining members of the Kansas City, Missouri Police Board, Officer Ty Grant and Sergeant Eric Greenwell, respectfully request that the Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

This case arises from the execution of a search warrant by a special team of Kansas City, Missouri police officers at petitioner's home in Kansas City, Missouri. The team conducted the search as a "dynamic entry" – without knocking or announcing their presence – based on the following information contained in the search warrant application (Pet. 2a-3a; Pet. 67a-68a):

- According to an anonymous tip, petitioner was operating a methamphetamine laboratory in his home and was selling methamphetamine and crack cocaine from his home;
- According to the same tip, firearms were present in petitioner's home; and
- Petitioner's son, who was thought to be "involved," had recently been arrested for possessing a sawed-off shotgun.

The investigating officer, Detective Williamson, corroborated the tip by searching a trash bag left in front of petitioner's home, where he found the following (Pet. 3a):

- Methamphetamine residue in two plastic bags;
- Approximately 50 plastic sandwich bags with the corners cut off, of a type commonly used in packaging and distributing methamphetamine;
- An empty bottle of an over-the-counter cold medication containing pseudoephedrine, a component used in manufacturing methamphetamine;
- Correspondence addressed to petitioner, thus tending to confirm that the trash bag in fact contained petitioner's trash.

Detective Williamson used this information to obtain a warrant to search petitioner's home. Pet. 3a. He did not seek, and thus did not obtain, a warrant authorizing a "no-knock" entry. Pet. 53a. No Missouri statute requires, or even authorizes, the use of "no-knock" warrants, but one reported federal decision, decided more than two years after the challenged search below, suggests that their use is permissible in Missouri. *See United States v. Mack*, 117 F. Supp.2d 935, 942 (W.D. Mo. 2000).

Execution of the search warrant was assigned to a specialized unit, the Street Narcotics Unit, led by respondent Sergeant Eric Greenwell. Pet. 3a-4a. Sergeant Greenwell met with Detective Williamson to discuss the latter's investigation, and drove with him by petitioner's home to verify its location and determine any tactical concerns. Pet. 4a. On the night the search was conducted, Sergeant Greenwell designated respondent Officer Ty Grant as the "ram officer," and authorized him to forcibly enter petitioner's home without knocking. Pet. 2a, 4a. The search team other than Officer Grant wore respirators,

and was accompanied by fire and ambulance equipment and crews. *Id.* at 4a.

Officer Grant broke down petitioner's front door using a battering ram, as he simultaneously announced, "Police, search warrant!" Pet. 2a. When petitioner approached the officers carrying a handgun, one of the officers, Officer Sumpter, shot petitioner and seriously wounded him. *Id.*

Petitioner brought this suit against Sergeant Greenwell, the team leader, Officer Grant, the "ram" officer, and Detective Williamson, who had conducted the investigation leading to the warrant, under 42 U.S.C. § 1983 for a deprivation of his constitutional rights, and specifically for what petitioner alleged was a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Pet. 2a. Petitioner also sued Officer Sumpter, who fired the shots that injured him, for excessive use of force. *Id.* Petitioner also brought suit against the Kansas City, Missouri Board of Police Commissioners for what he alleged was a failure to train the individual officers (specifically, Officer Grant) and for an alleged custom and practice of unconstitutional searches. *Id.* Petitioner recognized that his claims against the Board depended in the first instance on the individual liability of Officer Grant, the "ram" officer – the jury instructions expressly required such a finding against Officer Grant before the Board could be held liable. *See* Instructions 25, 28 (App. A).

The trial court, The Honorable Nanette Laughrey, denied respondents' summary judgment motion on qualified immunity grounds, ruling as a matter of law that "there is insufficient evidence of exigent circumstances to justify dispensing with the knock and announce requirement," but entered judgment for Detective Williamson, the

investigating officer. Pet. 4a-5a. The remaining claims were tried to a jury, which found in favor of Officer Sumpter, the individual who had fired the shots that injured plaintiff, but against defendant Greenwell, the head of the search team, Officer Grant, the "ram" officer, and the individual Board members. Pet. 5, 5a. The trial court entered judgment in the amount of $2,015,000 on the jury's verdict. Pet. 5.

An Eighth Circuit panel initially affirmed the judgment. Pet. 30a-48a. On rehearing en banc, the judgment was reversed and the case was remanded with instructions to dismiss the Complaint. Pet. 1a-29a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Is a Poor Candidate for Certiorari Because Petitioner Effectively Admits That He Is Seeking to Create a New Constitutional Duty, Which for Qualified Immunity Reasons Will Not Affect Any Party to This Case.

Wholly apart from whether the claimed conflict either exists at all or is as severe as petitioner maintains, and wholly apart from the wisdom of the new, bright-line rule petitioner wants the Court to adopt, this case is a particularly poor candidate for certiorari because ultimately the issues petitioner wants resolved cannot affect the existing dispute between the present parties. Thus any opinion the Court were to issue would be advisory at best, and certiorari should be denied for this reason alone.

This is not a case involving a motion to suppress or other procedural ruling where the Court's adoption of a

new rule requiring the use of "no-knock" warrants in states where they are available, or its announcement of new guidance on the scope of "no-knock" searches, could simply be applied retroactively to bar the use of evidence in the existing case. *See, e.g., United States v. Johnson*, 457 U.S. 537, 562 (1982) (applying newly-announced Fourth Amendment principle to suppress evidence). It is instead an action under 42 U.S.C. § 1983 to hold two individual police officers and Police Board members personally liable for failing to predict answers to what petitioner himself now argues are questions that have supposedly "divided" courts and led to "confusion" among them. Pet. 10, 13.

Petitioner's first point asks the Court to grant certiorari and hold that, only in the 34 states that now purportedly allow the use of "no-knock" warrants, police officers should henceforth be *required*, contrary to existing federal precedent, to obtain such a warrant before conducting an unannounced search unless new exigent circumstances supporting such a search arise after the warrant application. His second point asks the Court to clarify when "no-knock" searches may be performed, again citing the supposed lower court "confusion" over this issue. Pet. 18. Thus, in the unlikely event the Court sees a need to adopt the new constitutional duty suggested by petitioner, or to clarify the existing scope of "no-knock" searches, any resolution of issues petitioner himself claims are "confusing" could not retroactively create a "clearly established" right sufficient to support a § 1983 claim against the present defendants.[1] Instead, qualified immunity would

[1] Petitioner, no doubt anticipating this flaw in his petition, suggests in passing that there are no immunity questions in the present suit. *See* Pet. at 5, 27. But qualified immunity was specifically

(Continued on following page)

apply to bar any attempt to hold the individual defendants liable. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 195 (2001) (holding individual defendant entitled to immunity in § 1983 case where alleged constitutional violation was not of a "clearly established" right); *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 598-99 (2004) (reversing judgment because, regardless of correctness of constitutional determination, qualified immunity would in any event apply to preclude liability).

The supposed "confusion" (Pet. 8, 13, 18) over the constitutional issues in this case necessarily means as a practical matter that the existing judgment in favor of respondents will ultimately stand here, regardless of whether the Court decides to change existing law, for the simple reason that respondents could not be held personally liable for violating a "clearly established" right that was first announced more than seven years after the events in question. The issues raised by petitioner, to the extent they deserve consideration at all, thus would be more appropriately raised in a motion to suppress case, where their resolution would have practical significance for the parties before the Court. The First Circuit in *Joyce v. Town of Tewksbury*, 112 F.3d 19 (1st Cir. 1997) (en banc), recognized this exact problem when it affirmed a judgment for police officers and municipalities in a § 1983 action. *See* 112 F.3d at 23 ("Resolution [of an unsettled constitutional issue] can properly await a case where the issue is decisive,

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raised in this case in defendants' summary judgment motions. *See, e.g.*, Defendant Grant's Summary Judgment Motion, App. B. It certainly will be raised again on any remand if the Court were to accept petitioner's invitation to either create a new constitutional duty or clarify existing law.

as it could easily be on a suppression claim where qualified immunity does not apply.").[2]

Petitioner himself effectively recognizes (Pet. 10, 13, 18) that there is not now the "clearly established" constitutional precedent that could ultimately overcome the individual defendants' qualified immunity from suit, and thus establish liability against either them or the Board.[3] If the Court does see some need for clarification in the area of unannounced searches, it should revisit current law in the context of a motion to suppress or similar

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[2] Although *Joyce* was decided before the two-part inquiry required by *Saucier*, which instructs lower courts to decide constitutional issues before proceeding to qualified immunity, 533 U.S. at 207, *Joyce* nevertheless correctly notes that the same constitutional issues presented in qualified immunity settings will also "easily" arise in suppression cases, where they will have the added benefit of deciding the very dispute under consideration. 112 F.3d at 23; *see also Brosseau*, 543 U.S. 194, 125 S.Ct. 596, 598-99 (recognizing that, regardless of whether lower courts had correctly resolved constitutional issue, qualified immunity would nevertheless bar § 1983 claim).

[3] Although petitioner suggests that "qualified immunity complications" are not involved here with respect to the members of the Police Board (Pet. 27), petitioner misapprehends the fact that liability against the Board was predicated on the individual liability of Officer Grant, who will necessarily be protected by qualified immunity. *See* Instructions 25, 28 (App. A) (requiring verdict against defendant Grant before jury could reach question of Board liability); *see also Olinger v. Larson*, 134 F.3d 1362, 1367 (8th Cir. 1998) (stating that municipality "cannot be liable . . . whether on a failure to train theory or a municipal custom or policy theory, unless [an individual officer] is found liable on the underlying substantive claim") (quoting *Abbott v. City of Crocker*, 30 F.3d 994, 998 (8th Cir. 1994)). In any event, if the constitutional claims were not "clearly established" for the individual police officers, they also cannot have been "clearly established" for the Board. *See Joyce*, 112 F.3d at 23 (recognizing that "unsettled" nature of constitutional issue precluded judgment in § 1983 case not only against individual police officers, but against municipality as well, on qualified immunity grounds).

procedural setting, where the "qualified immunity complications" to which petitioner himself alludes (Pet. 27) would not be present.

II. The Alleged Conflict Presented in Petitioner's First Question Is Neither Clear Nor Significant.

Petitioner's supposed direct and far-reaching conflict in any event does not really exist.[4] As even petitioner acknowledges, the federal decisions are uniform at the circuit level in either supporting the result reached by the Eighth Circuit below, or in not contradicting it. *See United States v. Musa*, 401 F.3d 1208, 1214-15 (10th Cir. 2005) (holding that there is no constitutional requirement to seek a "no-knock" warrant when police reasonably believe a "no-knock" search is necessary), *cert. denied*, 74 U.S.L.W. 3210 (U.S. Oct. 3, 2005); *United States v. Shipley*, 45 Fed. Appx. 706, 708 (9th Cir. 2002) (same); *see also Dalia v. United States*, 441 U.S. 238, 257 (1979) (stating that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures' ").[5]

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[4] Nor would the new constitutional rule petitioner seeks have nationwide applicability. As petitioner effectively acknowledges, Pet. 8-9, only in 34 of the 50 states, where petitioner argues "no-knock" search warrants are now "allowed," could there possibly be some requirement under petitioner's proposed rule for law enforcement officers to seek threshold court approval for "no-knock" searches.

[5] The evenly split en banc decision in *United States v. Brown*, 276 F.3d 14 (1st Cir. 2002) (en banc) is not contrary to the decision below – in fact, its effect was to vacate an earlier panel decision that had supported petitioner's position.

Petitioner's alleged conflict is thus based on a handful of supposedly contrary state court decisions. But these cases all involved, at least in part, state courts' interpretations of their own statutes or decisional law.[6] As the Eighth Circuit noted below in effectively distinguishing the state law decisions on which petitioner now relies (and thus avoiding any direct conflict with them) (Pet. 10a):

> Of course, state law may require, by statute or judicial decision, that law enforcement officers who have reason to believe that exigent circumstances justify a no-knock entry include a request for that authority in the warrant application. *See Davis v. State*, 859 A.2d 1112, 1124-26 (Md. 2004) (collecting conflicting authorities from various States). But for Fourth Amendment purposes, the relevant question is whether the police have reasonable suspicion of exigent circumstances at the time they execute the warrant.

These same state cases in any event do not directly stand for the broad constitutional principle that petitioner advances. In *Garza v. State*, 632 N.W.2d 633 (Minn. 2001), for example, the decision was not based on a failure to obtain a "no-knock" warrant – the police in *Garza* actually had such a warrant, and the court simply suppressed evidence because it held that the *magistrate's* decision to add a "no-knock" provision was insufficiently supported. 632 N.W.2d at 638-39. In *Commonwealth v. Jimenez*, 780 N.E.2d 2 (Mass. 2002), the police also had obtained a

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[6] Every "conflicting" state court decision cited by petitioner concerned motions to suppress evidence in state court criminal proceedings – none sought to subject individual officers to personal liability based on some "clearly established" constitutional requirement to seek prior judicial approval of an unannounced entry.

"no-knock" warrant, which the court found had been improvidently executed because of changed, fact-specific circumstances, thus requiring evidence to be suppressed. *Id.* at 9-10. Even petitioner's principal case, the Montana decision in *State v. Anyan*, 104 P.3d 511 (Mont. 2004), *cert. denied*, 125 S.Ct. 2544 (2005), suggests only that in Montana, police "ordinarily" should seek prior judicial approval for "no-knock" searches. 104 P.2d at 525. In reaching this conclusion, moreover, *Anyan* relied in part on the Montana Constitution, which it held provided broader protection than the Fourth Amendment. *See* 104 P.3d at 524-25 (stating that "Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution") (citations omitted).

None of petitioner's "conflicting" cases were actions for damages under 42 U.S.C. § 1983. None purported to adopt, as a matter of federal constitutional law, the bright-line constitutional rule petitioner now seeks from the Court. The alleged conflict, to the extent it is a conflict at all, is certainly neither severe nor "pressing." Pet. 15. At most, it represents a preference on the part of a few states for prior judicial approval for unannounced searches in appropriate circumstances. This is not a "conflict" that warrants the Court's intervention.

III. The Eighth Circuit's Resolution of Petitioner's First Question Was in Any Event Correct, and Petitioner's Proposed Bright-Line Rule Would Be Bad Public Policy.

The Eighth Circuit's decision was in any event manifestly correct as a matter of both constitutional law and

public policy. Exigent circumstances supporting a "no-knock" search should always be available to consider a search's reasonableness for purposes of 42 U.S.C. § 1983, regardless of whether these circumstances were first presented to a judicial officer. *See, e.g., Dalia*, 441 U.S. at 258-59; *Musa*, 401 F.3d at 1214-15. As the en banc court noted below:

> To be sure, many exigent circumstances cases have turned on facts that unfolded as the police approached the house to be searched, or after they initially knocked. *See, e.g., Richards*, 520 U.S. at 388-89. But the Fourth Amendment analysis turns on the totality of the circumstances, including facts gathered by the police before they applied for the warrant. *See United States v. Scroggins*, 361 F.3d 1075, 1081-82 (8th Cir. 2004). The district court's approach would *require* that the police request no-knock authority whenever the basis for a warrant application might justify a no-knock entry. Such a rule might encourage excessive use of the no-knock tactic and would be contrary to Supreme Court decisions applying the Fourth Amendment's reasonableness standard. Therefore, if the facts known prior to obtaining the warrant justify a no-knock entry, and if no contrary facts are discernable to the officers who execute the warrant, the no-knock entry is constitutionally reasonable.

Pet. 11a (emphasis original).

Contrary to petitioner's claim, nothing about the decision below "contravenes fundamental Fourth Amendment principles." Pet. 10. The Court has repeatedly recognized that safety concerns can justify executing search warrants without knocking and announcing. *See*

Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (recognizing that officers may conduct "no-knock" entry when they have a "reasonable suspicion" that announcing their presence would create an undue safety risk); *Wilson v. Arkansas*, 514 U.S. 927, 937 (1995) (stating that countervailing law enforcement interests, including a reasonable belief that knocking and announcing "would have placed [the police] in peril," could "provide the necessary justification for an unannounced entry"); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (recognizing as "clearly reasonable" an unannounced search at a residence, when police had information from a confidential source that an individual "with a violent past who reportedly had access to a large supply of weapons" might be inside). None of these cases required police to specifically obtain "no-knock" warrants. They instead allowed the searches to be conducted based on the totality of the circumstances known to the officers at the time of the search. In fact, in *Richards*, the Court approved a "no-knock" search even though a magistrate had expressly refused to issue such a warrant. *Richards*, 520 U.S. at 395; *see also Dalia*, 441 U.S. at 258-59 (noting that particular method of executing warrants left to law enforcement, subject to Fourth Amendment reasonableness inquiry).

Current law provides powerful curbs to law enforcement excesses, including suppression of evidence and the threat of personal liability under 42 U.S.C. § 1983 for constitutional violations. There is already an incentive to seek prior judicial approval where appropriate because such prior approval would effectively immunize individual officers from personal § 1983 liability. But to make this a *requirement*, at the expense of the personal safety of law enforcement officers facing imminent danger, cannot be a

wise policy. To the contrary, as the Eighth Circuit correctly noted below, it will merely invite police to justify and obtain "no-knock" warrants in advance as a matter of routine. Pet. 11a. It seems particularly unwise to subject officers to personal liability, even where at the time of entry the circumstances suggest imminent danger, simply because no application for a "no-knock" warrant was ever made. The Court's precedent now prudently authorizes a flexible standard of viewing the totality of the circumstances from the point of view of the executing officers at the time of the search. Here the Eighth Circuit properly followed this precedent, as did the police, and petitioner offers no convincing argument for now overruling it.

IV. Petitioner's Second Question Presents No Issue of Substance.

Petitioner's second question presents exactly the sort of fact-bound determination the Court should avoid, especially since nothing about this case would add meaningfully to the Court's existing decisions addressing the scope of permissible "no-knock" searches. Even if petitioner's second issue could impact the present parties – which it cannot, for the same qualified immunity considerations already discussed – whether the particular facts reasonably known to the officers here were sufficient to justify an unannounced search is not subject to serious debate. These facts certainly do not place this case in some grey area, or anywhere near the "fulcrum" (Pet. 22) of existing case law.

In arguing that circumstances like those here have "divided" courts (Pet. 19 *et seq.*), petitioner glosses over two key facts that readily supported the search under

existing precedent. Although petitioner correctly suggests (Pet. 18 *et seq.*) that the suspected presence of firearms cannot, standing alone, justify an unannounced search, the police officers here were not simply relying on a report that there were numerous weapons scattered throughout petitioner's home. Nor were they simply relying on some suspicion of unspecified "drug activity." Pet. 21. They instead had a report of a *clandestine methamphetamine lab*, and a separate report suggesting that a person "involved" in that operation (Pet. 67a-68a), and thus a potential occupant of the home (petitioner's son), had recently been arrested for possessing a sawed-off shotgun.[7] Both of these facts gave particularized support for a "no-knock" search.

Operating methamphetamine laboratories present unique, inherently dangerous risks. As the United States Department of Justice has noted in its publication *Methamphetamine Situation in the United States*: "[T]he clandestine nature of the [methamphetamine] manufacturing process and the presence of ignitable, corrosive, reactive, and toxic chemicals at the sites, have resulted in explosions, fires, toxic fumes, and irreparable damage to

[7] The fact that some of this information subsequently turned out to have been incorrect does not change the fact that it was reasonable for the individual officers here to have relied on it. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 145-46 (1979) (allowing police officer to rely on investigative work of others, and refusing to require him to independently investigate information given him by other law enforcement personnel). Indeed, petitioner does not argue to the contrary, but assumes the information available to the entry team was correct even as he asks the Court to hold it did not justify the entry into petitioner's home.

human health and to the environment."[6] And it is not just the chemicals used in manufacturing methamphetamine that are hazardous – the same DEA report suggests that individuals operating such illicit labs tend themselves to be inherently violent and dangerous:

> Methamphetamine laboratory operators often are well-armed, and their laboratories occasionally are booby-trapped and equipped with scanning devices employed as security precautions. Weaponry, ranging from single firearms to arsenals of high-powered weapons and explosives, are commonly found at laboratory sites. Laboratory operators, or "cooks," frequently display little concern for public safety or the environment.

Id. The special search team was acutely aware of these inherent risks when it executed the search warrant. *See* App. at 13a-14a (recounting Sergeant Greenwell's testimony about the inherent safety risks of clandestine methamphetamine labs).

The report about the sawed-off shotgun raised further specific concerns. Simply possessing such a weapon is prima facie evidence of a tendency toward violent conduct. *See, e.g., United States v. Johnson*, 246 F.3d 330, 334-35 (4th Cir. 2001) (agreeing with three other circuits that, "unlike the possession of a handgun or shotgun, the possession of a sawed-off shotgun always presents a serious potential risk of physical injury to another") (citing *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir.

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[6] United States Department of Justice, Drug Enforcement Administration, *Methamphetamine Situation in the United States, March 1996* (visited October 12, 2005) http://www.fas.org/irp/agency/doj/dea/product/meth/threat.htm#hazmat.

2001); *United States v. Allegree*, 175 F.3d 648, 651 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999); and *United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993)); *see also United States v. Fortes*, 141 F.3d 1, 6-8 (1st Cir. 1998) (concluding that mere possession of a sawed-off shotgun is a "violent felony" within the meaning of 8 U.S.C. § 924(e)).

The Court's existing decisions adequately address this very situation, and signal clearly that law enforcement safety concerns can excuse a duty to knock and announce in appropriate cases. Here the officers on the scene reasonably expected (1) an operating methamphetamine lab, with all its inherent risks; (2) weapons throughout the house; (3) drug sales being conducted from the house in small, easily disposable packages; *and*, critically, (4) the presence of dangerous individuals, not just because of the suspected methamphetamine laboratory, but also because of the specific information that one of the assumed occupants had recently been arrested for possessing a sawed-off shotgun, a weapon that has no purpose other than to inflict violent injury or death.

Far from resting at or near the "fulcrum" (Pet. 22), this case easily falls within the recognized ambit of exigent circumstances justifying a "no-knock" search under the Court's established precedent. None of the supposedly "conflicting" cases cited by petitioner presented this level of risk. There was no confusion in this case, and there is insufficient confusion generally in the lower courts, to justify the Court's revisiting this well-defined area, even if the facts here were not so clearly covered by existing precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

INSTRUCTION NO. 25

If you find in favor of plaintiff on his claim against Defendant Grant as submitted in Instruction Number 19, then you must consider plaintiff's failure to train claim against Defendants Dennis C. Eckold, Dr. Stacey Daniels-Young, Karl Zobrist, Juavier M. Perez, Jr. and Mayor Kay Barnes, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri.

Your verdict must be for plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:

First, that the training program of the Kansas City, Missouri Police Department was inadequate to train its officers when to knock, or when to wait a reasonable period of time after making an announcement, before forcibly entering a residence; and

Second, the need for more training or different training was so obvious that the Board can reasonably be said to have been deliberately indifferent to the need for such training; and

Third, as a direct result, plaintiff was damaged.

Mere negligence or inadvertence does not constitute deliberate indifference.

INSTRUCTION NO. 28

If you find in favor of plaintiff on his claim against Defendant Grant as submitted in Instruction Number 19, then you must consider plaintiff's custom and practice

claim against Defendants Dennis C. Eckold, Dr. Stacey Daniels-Young, Karl Zobrist, Juavier M. Perez, Jr. and Mayor Kay Barnes, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri.

Your verdict must be for plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:

First, the Kansas City, Missouri Police department had a custom and practice that either did not require a knock before announcement, or did not require waiting for a reasonable period of time after making an announcement, before forcibly entering a residence; and

Second, such custom and practice was so obvious that the Board can reasonably be said to have been deliberately indifferent to the existence of the custom and practice; and

Third, as a direct result, plaintiff was damaged.

Mere negligence or inadvertence does not constitute deliberate indifference.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID DORAN,	)	
Plaintiff,	)	
v.	)	**Case No. 01-0824-CV-W-5**
DENNIS C. ECKOLD, et al.,	)	
Defendants.	)	

SEPARATE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT GRANT

COMES NOW Defendant, Sergeant Ty Grant (Grant), by and through his undersigned counsel, and pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, moves and prays the Court to enter its Order granting summary judgment in favor of Grant and against Plaintiff David Doran (Doran) for the following reasons:

1. Doran's Complaint fails to establish any genuine issue of material fact and Grant is entitled to judgment as a matter of law.

2. As to Count III of Doran's Complaint, there is no evidence nor will there be any evidence that Grant used excessive force when removing Doran from the residence at 612 West 101st Street, Kansas City, Missouri on August 11, 1998 or that Grant failed to seek medical treatment for Doran and as a result, Grant is entitled to judgment as a matter of law.

3. As to Count III of Doran's Complaint, Grant is entitled to qualified immunity. 4. As to Count IV of Doran's Complaint, there is no evidence nor will there be any evidence that Grant used excessive force on Doran as suggested above or that he committed an assault and/or battery on Doran and as a result, Grant is entitled to judgment as a matter of law.

5. As to Count IV of Doran's Complaint, Grant is entitled to official immunity.

6. As to Count VI of Doran's Complaint, there is no evidence nor will there be any evidence that Grant conducted an illegal search of Doran's residence or that Grant caused excessive damage to Doran's property and as a result, Grant is entitled to judgment as a matter of law.

7. As to count VI of Doran's Complaint, Grant is entitled to qualified immunity.

In support of this motion, Grant files herewith his Suggestions.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV - 7 2005
OFFICE OF THE CLERK

No. 05-316

IN THE
Supreme Court of the United States

DAVID DORAN,
Petitioner,

v.

DENNIS ECKOLD, in his official capacity as President of the Board of Police Commissioners of Kansas City, Missouri, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' overarching contention is that this civil lawsuit is the wrong kind of setting to resolve the uncertainties concerning the Fourth Amendment's knock-and-announce doctrine. Better, they say, to wait for suppression dispute in a criminal case. But Respondents have it exactly backwards. The Framers envisioned lawsuits just like this – quasi-tort suits where damages would be paid by local government entities – as the principal means of developing and enforcing the prohibition against unreasonable searches or seizures. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 410 (1995) ("In the eighteenth century limits on search and seizure were enforced, if at all, in trespass actions" tried to juries.); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 785-86, 812 (1994) ("Tort law remedies [paid by governmental entities] were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions."). The exclusionary rule has no comparable pedigree, and depending on this Court's upcoming ruling in *Hudson v. Michigan*, No. 04-1360, may be completely inapplicable in this context.

This case, in short, is a perfect vehicle to bring order to substantive knock-and-announce law. The jury's verdict rests on a departmental custom and practice, so qualified immunity is irrelevant to the outcome. The issues over which the Eighth Circuit's en banc court divided have divided other courts as well. And the Eighth Circuit majority's resolution of these issues contravenes this Court's precedent.

I. The Qualified Immunity Doctrine Is Irrelevant Here.

Not once in Respondents' 103 pages of briefing in their motion for new trial, their merits briefs to Eighth Circuit, their en banc petition, or their supplemental merits brief to en banc court did Respondents argue that the qualified immunity

doctrine shielded any of them from liability. The Eighth Circuit's opinion is entirely silent on the subject. Nevertheless, Respondents' principal argument in opposition to certiorari is that reversing the Eighth Circuit with respect to either question presented "cannot affect the existing dispute between the parties" because the individual officers are entitled to qualified immunity, which, in turn, insulates the Board of Police Commissioners from municipal liability. Br. in Opp. at 4-8.

Respondents' new post-verdict argument misapprehends how basic § 1983 law applies to the undisputed contours of the district court's judgment. The jury found that individual officers' failures to knock and announce violated the Fourth Amendment and that the officers committed those violations pursuant to the Board's custom and practice never to knock and announce – regardless of the type of warrant obtained – before executing warrants on suspected "drug houses." *See* Pet. for Cert. at 4-5.[1] Once the jury entered this verdict against the Board, any qualified immunity defense the individual officers might have raised before trial became irrelevant to the amount of money that Petitioner may recover. Respondents are jointly and severally liable for the injuries they jointly caused, so the verdict against the Board is sufficient, in and of itself, to sustain the full monetary judgment in favor of Petitioner. No individual officer will have to pay a dime. *See* App. 59a-61a.

Lest there be any confusion, the verdict against the Board does not depend in any way on whether any individual officers violated Petitioner's "clearly established" rights. The Board is a municipal entity, and it long has been settled that municipal entities do not enjoy any kind of qualified, or "good faith," immunity under § 1983 for unconstitutional customs, practices, or policies – *even when those entities' individual officers*

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[1] Although Respondents state at one point that the jury held the Board members "personally liable," Br. in Opp. at 5, the record is clear that Board members were sued only in their official capacities, as stand-ins for the Board (i.e, the municipal entity) itself. *See* Pet. App. 60a, 31a, 35a.

themselves act in good faith and thus are entitled to qualified immunity in the same lawsuit. Owen v. City of Independence, 445 U.S. 622, 650-57 (1980); *see also Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691 (1978). While Respondents may believe that municipal entities should not be held liable unless their policies violate "clearly established" rights (Br. in Opp. at 5-7), this Court expressly held in *Owen* – consistent with the Fourth Amendment's history – that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 655. The tragic facts of this case underscore the wisdom and good sense of that holding.[2]

That the jury instructions here required the jury to find that Officer Grant violated Doran's Fourth Amendment rights in order to impose liability against the Board (*see* Br. in Opp. at 7 n.3 & App. A) does not change the calculus. Consistent with the district court's pretrial ruling rejecting Officer Grant's assertion of qualified immunity (*see* Br. in Opp. at 3), the jury instructions respecting Officer Grant's liability required the jury to find only that he violated the Fourth Amendment; they contained no reference, in name or substance, to the qualified

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[2] Indeed, under the original understanding of the Fourth Amendment, it would be proper, under these circumstances, to impose liability against the Board even if the officers here had not acted according to a departmental custom and practice. *See* Amar, *supra,* 107 Harv. L. Rev. at 812 (the Framers would have found it a "shocking violation of first principles" to absolve a police department for liability in *any case* in which officers violated the Fourth Amendment, "even if they acted in good faith that their behavior was fully constitutional"). It is undisputed, however, that the officers here acted pursuant to a departmental custom and practice, so there is no need to go beyond the four corners of *Owen* in this case.

immunity doctrine.[3] Consequently, the instructions respecting municipal liability were perfectly correct, for someone must actually violate a plaintiff's constitutional rights in order for the plaintiff to hold a municipality liable for an unconstitutional custom or practice. *See* Pet. for Cert. at 5 (citing cases). To the extent Respondents are suggesting that, in order to impose municipal liability, the jury here should have been required to find – contrary to the actual instructions – that an individual officer violated "clearly established" Fourth Amendment law, *Owen* squarely forecloses this argument.

II. This Court Should Resolve Whether Officers' Failures To Seek No-Knock Warrants When All Relevant Facts Are Foreknown Precludes, Or At Least Casts Doubt On, The Constitutional Reasonableness Of No-Knock Entries.

Respondents argue that there is no real conflict concerning the first question presented and that the Eighth Circuit majority's holding on the issue is correct. Neither argument is correct.

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[3] Jury instruction 19, the instruction on Petitioner's claim against Officer Grant, provided in full:

> Your verdict must be for the plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:
>
> *First*, Defendant Grant entered plaintiff's residence without first knocking or waiting a reasonable period of time after announcing the presence of the police and their intentions; and
>
> *Second*, as a direct result, plaintiff was damaged.

A. The Conflict On This Issue Is Real.

Respondents contend that the Fourth Amendment conflict over the permissibility of officers' substituting their judgment for an available magistrates' with respect to whether a no-knock entry is justified "does not really exist" because (1) all four state high court decisions taking the same position as the Eighth Circuit dissenting judges rest in part on state law and (2) the most recent Minnesota and Massachusetts decisions are distinguishable on their facts. Br. in Opp. at 8-10. Respondents are wrong on both counts.

1. Each of the four state high courts cited in the Petition for Certiorari holds that *the Fourth Amendment* bars no-knock entries under the circumstances here. *See State v. Anyan*, 104 P.3d 511, 525 (Mont. 2004) ("[T]he forced entry into the Appellants' house and subsequent search was unreasonable under *the Fourth Amendment* and under Article II, Sections 10 and 11 of the Montana Constitution because . . . the exigencies claimed by the State as justification for the no-knock entry were all foreknown by the authorities.") (emphasis added), *cert. denied*, 125 S. Ct. 2544 (2005); *Commonwealth v. Jimenez*, 780 N.E.2d 2, 5-6 (Mass. 2002) (applying knock-and-announce rules based on "our common law" and "the Fourth Amendment"); *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001) (applying "the Fourth Amendment of the U.S. Constitution"); *People v. Lujan*, 484 P.3d 1238, 1240-41 (Colo. 1971) (determining knock-and-announce rules "under the Fourth Amendment"). The first three opinions are expressly based on this Court's knock-and-announce decisions in *Wilson v. Arkansas*, 514 U.S. 927 (1995), and *Richards v. Wisconsin*, 520 U.S. 385 (1997); and the Colorado opinions apply this Court's prior case law. While some of these courts' analyses also reference parallel state protections against unreasonable searches, the courts' conclusions unquestionably depend on their interpretations of the Fourth Amendment.

To be sure, the conflicting state court decisions – just like the federal ones – arise in part from the presence of state laws and customs (like Missouri's longstanding custom here[4]) allowing police officers to obtain no-knock warrants. But these state laws, as frequently occurs in other areas of constitutional law, merely set the stage for a federal issue: here, whether the availability of such warrants sometimes renders officers' failure to obtain them constitutionally unreasonable. *Cf. Smith v. Massachusetts*, 125 S. Ct. 1129, 1138 (2005) (state law precluding reconsideration of midtrial directed verdicts creates possibility for Double Jeopardy violation); *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (state law creating sentencing thresholds creates possibility for Sixth Amendment violation); *Crawford v. Washington*, 541 U.S. 36 (2004) (ability to introduce evidence under state hearsay law gives rise to Confrontation Clause violation). On this Fourth Amendment issue, federal and state courts are divided, the First Circuit equally divided after an en banc hearing, and the Eighth Circuit divided here. *See* Pet. for Cert. at 10-15.

2. It is irrelevant that the *Garza* and *Jimenez* decisions do not actually find that the Fourth Amendment was violated. Those decisions enunciate a rule that conflicts with the Eighth Circuit's here, and – as the Petition for Certiorari explained – other decisions from Minnesota and Massachusetts have applied that rule to find Fourth Amendment violations when officers relied solely on foreknown suspicions to execute regular warrants with no-knock entries. *See* Pet. for Cert. at 12 nn.3 & 4 (discussing cases).

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[4] While Respondents say that case law "suggests" that Missouri permits magistrates to issue no-knock warrants, Br. in Opp. at 2, there is no doubt that Missouri police officers have been allowed to obtain such warrants since long before the search at issue here. The Chief of Police testified in this very case that "[i]f you have enough information, you can go get a no-knock warrant." Tr. of Jury Trial at 585 (Oct. 23, 2002).

B. The Eighth Circuit's Holding Is Incorrect.

Two of Respondents' comments concerning the merits of this Fourth Amendment issue warrant a response.

1. Respondents repeatedly assert that Petitioner is seeking a "bright-line rule," which they suggest would be contrary to this Court's "flexible standard" for assessing no-knock entries. Br. in Opp. 10, 13. But it is the Eighth Circuit, not Petitioner, that has locked itself into a bright-line rule, holding that the failure to seek advance authorization from an available magistrate is *always irrelevant* in assessing the constitutionality of a no-knock entry. App. 10a-11a. In reviewing that decision, this Court could adopt the opposite bright-line rule (as several courts have) or a flexible standard providing (as Respondents characterizes the Montana Supreme Court as holding, *see* Br. in Opp. at 10) that the failure to seek preauthorization creates a presumption undercutting the reasonableness of a no-knock entry. It is the Eighth Circuit majority's rejection either possibility – not Petitioner's argument – that is impossible to square with this Court's Fourth Amendment precedent. *See* Pet. for Cert. at 16-18.

2. It is particularly ironic that Respondents endorse the Eighth Circuit's approach making magistrates categorically irrelevant while, at the same time, endorsing the doctrine that obtaining a no-knock warrant should "effectively immunize" individual officers from § 1983 liability and criminal prosecutions from the exclusionary rule. Br. in Opp. at 12; *see also* Pet. for Cert. at 16 & n.8 (detailing Eighth Circuit's and other courts' holdings to this effect). The only possible basis for this immunization doctrine is the Fourth Amendment's preference that determinations concerning intrusions into homes be made in the first instance by neutral magistrates. Once, however, one accepts the pertinence of the Fourth Amendment's preference in this realm, it follows inexorably that the *failure* to seek an advance determination from an available magistrate should

have an opposite effect on the legality of a no-knock entry; it should case doubt on, if not preclude, the constitutional reasonableness of such an entry.

III. This Court Should Resolve Whether Suspicions, Such As Those Here, Concerning Drug Activity And Weapons Create Exigent Circumstances Permitting Officers To Conduct No-Knock Entries.

Respondents suggest that review of the Petition's second question presented is unnecessary because (1) the question is "fact-bound" and (2) two "facts" in this case created a stronger exigency than was present in any of the allegedly conflicting decisions. Both suggestions lack merit.

1. It is, of course, true that this question presented turns to some extent on the facts in this case's record. But that is true of virtually every Fourth Amendment case involving the exigent circumstances doctrine, the reasonable suspicion doctrine, the probable cause doctrine, and any number of other doctrines. Accordingly, this Court traditionally has reviewed cases in these areas when they presented fact patterns generating conflicting results. The only serious question here is whether this case meets that standard.

2. It does. Neither the officers' suspicion that Petitioner's house contained a methamphetamine lab nor the anonymous tipster's assertion that Petitioner's son had been arrested for possessing a sawed-off shotgun distinguishes this case from the conflicting decisions cited in the Petition for Certiorari at pages 21-22. First, the Montana Supreme Court and the Seventh Circuit squarely have held suspecting the presence of a methamphetamine lab does *not* create any "inherent danger" that categorically distinguishes it from other suspected drug operations. *See Anyan*, 104 P.3d at 523-24; *Jones v. Wilhelm*, 425 F.3d 455, 466-68 (7th Cir. 2005). Respondents do not cite a single case to the contrary. And this lack of authority is not

surprising, for it would contravene this Court's prohibition against "blanket rules" allowing no-knock entries in drug investigations. *See Richards*, 520 U.S. at 394; Pet. App. 36a.

Second, whatever presumptions regarding violence may pertain when a person is believed to possess a sawed-off shotgun, courts have held that exigent circumstances do not exist when officers lack a particularized reason to believe that a potentially violent person "would be in the residence at the time of the search." *United States v. Smith*, 386 F.3d 753, 760 (6th Cir. 2004); *see also State v. Wright*, 697 N.E.2d 693, 697-98 (Ill. 1998) (no exigent circumstances present when officers had observed on premises, one week before, several gang members "under investigation for firearm violence" and one who "had been convicted of aggravated discharge of firearm" because there was no evidence that any would be in house at the time of search or that homeowner himself had violent propensity). These holdings conflict with the Eighth Circuit's decision here. The police knew that Petitioner's son was twenty-six years old, and Respondents never have suggested the police had any particularized reason to believe he lived in, or would be inside, his parents' house when the officers conducted their search. *See* Pet. for Cert. at 20; Pet App. 68a.

Indeed, there are serious grounds to question whether the police even reasonably believed that Petitioner's son had been arrested for possessing a sawed-off shotgun. The officers' only source for that information – which turned out to be false – was the anonymous tip. While officers may reasonably rely on anonymous tipsters for many types of information, it is peculiar that the police would rely on a tipster regarding information that is uniquely within the police's own control: whether someone has been arrested or being investigated for committing a crime. The police's failure here to check the accuracy of the tip in that respect highlights the need for this Court to grant review and to confirm that the investigative prerequisites for justifying no-knock entries are meaningful.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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